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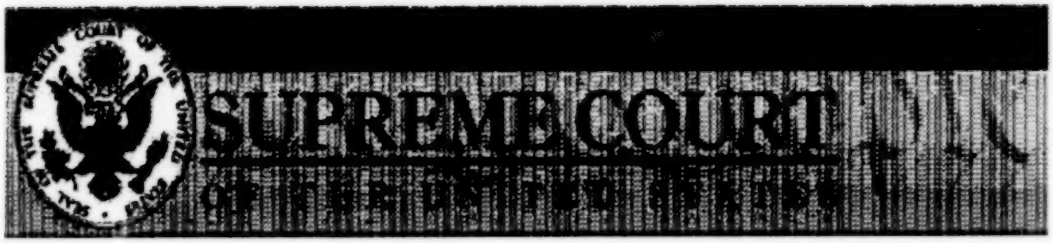

No. 13-604

Title: Nicholas Brady Heien, Petitioner
v.
North Carolina

Docketed: November 18, 2013

Lower Ct: Supreme Court of North Carolina

Case Nos.: (380A11-2)

Decision Date: November 8, 2013

Questions Presented

--- Date---	------- Proceedings and Orders----------
Nov 13 2013	Petition for a writ of certiorari filed. (Response due December 18, 2013)
Dec 6 2013	Waiver of right of respondent North Carolina to respond filed.
Dec 6 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, rreceived from counsel for the respondent.
Dec 18 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Dec 24 2013	DISTRIBUTED for Conference of January 10, 2014.
Jan 6 2014	Response Requested. (Due February 5, 2014)
Jan 29 2014	Order extending time to file response to petition to and including March 7, 2014.
Mar 7 2014	Brief of respondent North Carolina in opposition filed.
Mar 18 2014	Reply of petitioner Nicholas Brady Heien filed.
Mar 19 2014	DISTRIBUTED for Conference of April 4, 2014.
Apr 7 2014	DISTRIBUTED for Conference of April 18, 2014.
Apr 21 2014	Petition GRANTED.
May 13 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 9, 2014.
May 13 2014	The time to file respondent's brief on the merits is extended to and including July 14, 2014.
May 22 2014	Order further extending time to file respondent's brief on the merits to and including July 21, 2014.
May 22 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
May 28 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jun 9 2014	Joint appendix filed. (Statement of costs filed.)

Jun 9 2014	Brief of petitioner Nicholas Brady Heien filed.
Jun 16 2014	Brief amicus curiae of Gun Owners Foundation, et al. filed.
Jun 16 2014	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jun 16 2014	Brief amici curiae of Professors Charles E. MacLean & Adam Lamparello filed.
Jun 16 2014	Brief amicus curiae of Rutherford Institute filed.
Jul 9 2014	Record requested from Supreme Court of North Carolina.
Jul 14 2014	Record received from the Supreme Court of North Carolina. The record is electronic.
Jul 18 2014	SET FOR ARGUMENT ON Monday, October 6, 2014
Jul 21 2014	Brief of respondent North Carolina filed.
Jul 28 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 28 2014	Brief amicus curiae of the United States filed.
Jul 28 2014	Brief amici curiae of Wisconsin, et al. filed.
Jul 28 2014	Brief amici curiae of The Association of Prosecuting Attorneys, et al. filed.
Aug 7 2014	CIRCULATED.
Aug 20 2014	Reply of petitioner Nicholas Brady Heien filed. (Distributed)
Aug 29 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 6 2014	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Robert C. Montgomery, Senior Deputy Attorney General, Raleigh, N. C.; and Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

No. 13-___

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari
to the North Carolina Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nicholas Brady Heien respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The relevant opinion of the Supreme Court of North Carolina (Pet. App. 1a) is published at 737 S.E.2d 351. The relevant opinion of the Court of Appeals of North Carolina (Pet. App. 29a) is published at 714 S.E.2d 827. A subsequent opinion of the North Carolina Court of Appeals (Pet. App. 42a) is published at 741 S.E.2d 1, and an order from the North Carolina Supreme Court affirming that judgment (Pet. App. 41a) is published at ___ S.E.2d ___, 2013 WL 5973918.

JURISDICTION

The final judgment of the North Carolina Supreme Court was entered on November 8, 2013. Pet. App. 41a. An interlocutory decision from the North Carolina Supreme Court, resolving the federal question presented here, was issued in 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

The Fourth Amendment permits police officers to stop a motor vehicle and its occupants for law enforcement purposes only when there is at least reasonable suspicion that a law has been violated. This case presents a fundamental and frequently recurring question over which the state courts of last resort and federal courts of appeals are openly and intractably divided: whether an officer's mistaken but understandable view of the law can form the basis for reasonable suspicion. A bare majority of the North Carolina Supreme Court, acknowledging the conflict, held that it can.

1. Early one morning in 2009, petitioner Nicholas Heien and Maynor Javier Vasquez were traveling along Interstate 77 through Surry County, North Carolina. Vasquez was driving petitioner's car while petitioner slept in the back seat. Pet. App. 29a-30a.

While observing traffic on the interstate in order to "look[] for criminal indicators of drivers [and] passengers," Tr. of Suppression Hrg. 19, Officer Matt Darisse of the Surry County Sheriff's Department noticed Vazquez drive by. Pet. App. 29a. The officer thought Vasquez appeared "stiff and nervous," insofar as he was "gripping the steering wheel at a 10 and 2 position, looking straight ahead." Tr. 6. The officer pulled onto the highway and began following the vehicle. Pet. App. 29a.

As petitioner's car approached a slower-moving vehicle, Officer Darisse observed that the car's left brake light was properly functioning, but that the right rear brake light failed to illuminate. Though North Carolina requires all vehicles merely to have "a stop lamp," N.C. Gen. Stat. § 20-129(g) (emphasis

added), and no North Carolina appellate court had ever held that this statute requires two working lights, Officer Darisse activated his blue lights and stopped petitioner's vehicle. Pet. App. 29a. Another officer arrived later to assist. *Id.* 30a.

Officer Darisse informed Vasquez and petitioner that he had stopped them "for a nonfunctioning brake light." Pet. App. 2a. He then told Vasquez to step out of the car and asked Vasquez some questions about where he and petitioner were going. Meanwhile, the other officer walked to the backseat window and asked petitioner similar questions, which he answered differently from Vasquez. Officer Darisse also ran checks on Vasquez's driver's license and petitioner's registration, and issued Vasquez a warning citation for the brake light. *Id.* 2a-3a.

After issuing the warning, Officer Darisse asked Vasquez, who remained standing behind the car, for permission to search the vehicle. Vasquez demurred, explaining that the car belonged to petitioner. The officer then asked petitioner, who was still in the back seat, for permission, and petitioner consented to a search. The officers told Vasquez and petitioner to stand on the side of the road. The officers searched through the car for about forty minutes and found a plastic sandwich baggie containing cocaine.

2. The State charged petitioner with trafficking cocaine. (The State also charged Vasquez, and he pleaded guilty to attempted cocaine trafficking.) Petitioner responded by filing a motion to suppress the evidence that the officers had discovered during the search of his car. Petitioner argued that the traffic stop violated the Fourth Amendment because Officer Darisse lacked "reasonable articulable

suspicion that criminal activity had been committed or was being committed, or that a motor vehicle traffic offense or infraction had occurred." Am. Mot. to Suppress at 1. Petitioner also contended that his subsequent consent to the search was invalid. The trial court denied petitioner's motion.

In light of that ruling, petitioner pleaded guilty to two variations of drug trafficking, but he reserved the right to appeal the denial of his motion to suppress. Pet. App. 31a. Petitioner was sentenced to two consecutive prison terms of ten to twelve months.

3. On appeal, the North Carolina Court of Appeals reversed. Emphasizing the statutory phrase "*a* stop lamp" (as well as the phrase "*the* stop lamp"), the court first determined that North Carolina law requires only one working brake light. Pet. App. 34a (emphasis added) (citing N.C. Gen. Stat. § 20-129(g)).[1] Because petitioner's vehicle had a working brake light, it was in compliance with that law. The court of appeals then held that the stop violated the Fourth Amendment, explaining that "an officer's mistaken belief that a defendant has committed a

---

[1] The relevant subsection of the statute reads in full: "No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps." N.C. Gen. Stat. § 20-129(g).

traffic violation is not an objectively reasonable justification for a traffic stop." *Id.* 32a.

Having concluded that the stop was invalid, the court of appeals did not address petitioner's challenge to the validity of his subsequent consent. Pet. App. 39a-40a.

4. The North Carolina Supreme Court granted discretionary review, and by a 4-3 vote reversed. The State did not dispute, and the North Carolina Supreme Court therefore assumed, that North Carolina law requires only one working brake light. *See* Pet. App. 7a. But the court observed that "[v]arious federal and state courts have provided different answers" to the question "whether a stop is . permissible when an officer witnesses what he reasonably, though mistakenly, believes to be a traffic violation." *Id.* 8a-9a; *see also id.* 18a (acknowledging that courts "are divided" on the issue). And the court adopted the minority view on the issue, holding that "so long as an officer's mistake is reasonable, it may give rise to reasonable suspicion." *Id.* 18a. In the court's view, "requiring an officer to be more than reasonable, mandating that he be perfect, would impose a greater burden than that required under the Fourth Amendment." *Id.* 13a.

The North Carolina Supreme Court further held that Officer Darisse's mistake was "reasonable" because "[w]hen the stop at issue in this case occurred, neither this Court nor the Court of Appeals had ever interpreted our motor vehicle laws to require only one properly functioning brake light." Pet. App. 19a. Accordingly, it reversed the judgment of the North Carolina Court of Appeals, and

remanded for further proceedings on petitioner's consent argument. *Id.* 19a-20a.

Three justices dissented and argued that the court should have followed the majority of courts in holding that "an officer's mistake of law cannot be the basis for reasonable suspicion." Pet. App. 23a. The dissenters explained that the court's decision "introduces subjectivity into what was previously a well-settled objective inquiry." *Id.* 21a. They disagreed with the approach taken by their colleagues because the permissibility of investigatory searches and seizures turns simply on "whether the rule of [state] law as applied to the established facts *is or is not violated.*" *Id.* 23a (internal quotation marks omitted) (quoting *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996)). Thus, "according to the United States Supreme Court, it does not matter what the officer subjectively thinks the law is." Pet. App. 23a. Quoting an Eleventh Circuit decision on the issue, the dissent also stressed "the fundamental unfairness of holding citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it." *Id.* 27a (internal quotation marks omitted) (quoting *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003)).

5. On remand, the North Carolina Court of Appeals rejected petitioner's challenge to the validity of his consent. Pet. App. 42a-61a. The North

Carolina Supreme Court did as well, thus upholding petitioner's conviction and sentence. *Id.* 41a.[2]

6. This petition follows.

REASONS FOR GRANTING THE WRIT

I. Federal And State Courts Are Split Over Whether A Traffic Stop Supported Only By An Officer's Mistaken Interpretation Of The Law Can Comport With The Fourth Amendment.

In order to conduct a traffic stop, the Fourth Amendment mandates that the police have at least "reasonable suspicion" that a traffic law has been violated. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). As the North Carolina Supreme Court acknowledged, "federal and state courts have provided different answers" to the question whether "an officer's mistake of law" – which occurs where an officer accurately perceives a driver's conduct but incorrectly believes that the traffic code prohibits that conduct – may "give rise to [such] reasonable suspicion." Pet. App. 7a, 9a. At least ten federal courts of appeals and state courts of last resort hold that such mistakes can never supply reasonable suspicion for a stop, while five such courts hold that

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[2] The second appeal in the North Carolina Supreme Court focused exclusively on the consent issue. Petitioner was not allowed under North Carolina law to reassert his mistake-of-law claim in that proceeding, nor was he required to do so in order to preserve the argument for review in this Court, *see, e.g.*, *Urie v. Thompson*, 337 U.S. 163, 172-73 & n.12 (1949); *Gant v. Oklahoma City*, 289 U.S. 98, 100 (1933).

"when an officer witnesses what he reasonably, though mistakenly, believes to be a traffic violation," the Fourth Amendment allows the stop. Pet. App. 8a.

1. The majority of federal courts of appeals and state courts of last resort to address the issue have concluded – like the dissent below – that a mistake of law cannot supply the reasonable suspicion necessary to justify a traffic stop.

Five federal circuits have squarely adopted this rule. *See United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998) (even when a "reasonable person" would have thought the conduct unlawful, a traffic stop violates the Fourth Amendment when the driver's behavior did not actually violate state law); *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006) (same); *United States v. King*, 244 F.3d 736, 741 (9th Cir. 2001) ("[A]n officer's mistake of law cannot form the basis for reasonable suspicion to initiate a traffic stop" even if the officer's "interpretation of traffic law was reasonable."); *United States v. Nicholson*, 721 F.3d 1236, 1244 (10th Cir. 2013) ("Like most of our sister circuits, we judge the facts against the correct interpretation of the law, as opposed to any other interpretation, even if arguably a reasonable one."); *United States v. Chanthasouxat*, 342 F.3d 1271, 1279-80 (11th Cir. 2003) (same). Three others have endorsed the majority rule in the course of upholding traffic stops

that they concluded were not based on mistakes of law.[3]

Five state courts of last resort also have squarely held that a mistake of law "*cannot* provide objective grounds for reasonable suspicion." *Hilton v. State*, 961 So. 2d 284, 298 (Fla. 2007) (rejecting the argument that the officers' "reasonable, but incorrect, interpretation of the law justified the stop"); *see also State v. Louwrens*, 792 N.W.2d 649, 652 (Iowa 2010) (same); *Martin v. Kansas Dep't of Revenue*, 176 P.3d 938, 948 (Kan. 2008) (same); *State v. Anderson*, 683 N.W.2d 818, 824 (Minn. 2004) ("[W]hether made in good faith or not, the officer was mistaken in his interpretation of [the law], and therefore he lacked a particularized and objective basis for stopping [the defendant]."); *State v. Lacasella*, 60 P.3d 975, 981-82 (Mont. 2002) (same).[4]

---

[3] *See United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) (stating that "[s]tops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional," but upholding a stop predicated on a mistake of fact, not law); *United States v. Harrison*, 689 F.3d 301, 309 (3d Cir. 2012) (explaining that "a search conducted pursuant to a police officer's mistake as to the governing law, even if reasonable, is not permitted under the Fourth Amendment" before noting that the mistake was one of fact, not law); *United States v. Booker*, 496 F.3d 717, 722, 724 (D.C. Cir. 2007) (same), *vacated on other grounds*, 556 U.S. 1218 (2009).

[4] The District of Columbia Court of Appeals has adopted the majority position in the context of reviewing the validity of an arrest. *See In re T.L.*, 996 A.2d 805, 816 (D.C. 2010) ("[A]n officer's mistake of *law*, however reasonable, 'cannot provide the objective basis for reasonable suspicion or probable cause' needed to justify a search or seizure." (citations omitted)).

The Eleventh Circuit's opinion in *Chanthasouxat* applies the majority rule in a typical manner. There, an officer stopped the van in which the defendants were riding "for failure to have an inside rearview mirror." 342 F.3d at 1272. Although this condition did not actually violate the traffic code, the government argued that the officer's reasonable belief that it did nonetheless justified the stop. *Id.* at 1276. Such a belief was reasonable, the government contended, because the officer had previously written "more than 100 tickets for this 'violation'" and relied on advice from a city magistrate and his police training. *Id.* at 1279. The Eleventh Circuit agreed that the officer's "mistake of law was reasonable under the circumstances," but it held that the government's argument posed "the wrong question." *Id.* In the court's view, no mistake of law, "no matter how reasonable or understandable," can "provide reasonable suspicion or probable cause to justify a stop." *Id.* Thus, the stop violated the Fourth Amendment. *Id.* at 1280.

2. In direct contrast, one federal court of appeals and four state courts of last resort (including the North Carolina Supreme Court) hold that stops based on mistakes of law are valid where the underlying mistake is objectively reasonable. *See United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) & *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006); Pet. App. 12a-18a (adopting the Eighth Circuit's approach); *Travis v. State*, 959 S.W.2d 32, 34 (Ark. 1998) (upholding a stop where the officer "reasonably, albeit erroneously" interpreted the relevant statute); *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008) (same); *State v. Wright*, 791 N.W.2d 791,

798-99 (S.D. 2010) (adopting the Eighth Circuit's approach).

The Eighth Circuit's decision in *Martin* illustrates the minority position. There, an officer stopped the defendant's car after observing that his right brake light was out. 411 F.3d at 1000. In response to the defendant's argument that the stop violated the Fourth Amendment because the traffic code required only one brake light, the Eighth Circuit held that the determinative question was not "whether Martin actually violated the [law] . but whether an objectively reasonable police officer could have formed a reasonable suspicion that Martin was committing a code violation." *Id.* at 1001. The Eighth Circuit then concluded that because the officer's "misunderstanding" that the traffic code required two brake lights was "reasonable," the stop did not violate the Fourth Amendment. *Id.* at 1002.

3. Over time, the conflict over whether reasonable mistakes of law can justify a stop has grown deeper and more entrenched. Courts confronting the issue for the first time are no longer contributing to any process of percolation. Rather, as the North Carolina Supreme Court's opinion in this case illustrates, courts now are choosing between two well-developed options in a widely recognized conflict. Pet. App. 9a; *see also Coplin*, 463 F.3d at 101 (collecting cases on both sides of the split); *McDonald*, 453 F.3d at 961 (adopting the view of the "majority of circuits" after recognizing the two sides of the divide); *Louwrens*, 792 N.W.2d at 652 (choosing the "majority rule" after recognizing both approaches); *Wright*, 791 N.W.2d at 797-99 & n.2 (choosing the minority approach after collecting cases on both sides of the

split). Moreover, no court that has previously addressed the question presented has changed its position, despite opportunities to do so. *See, e.g.*, *United States v. Hastings*, 685 F.3d 724, 727 (8th Cir. 2012) (reaffirming *Martin*, 411 F.3d 998); *United States v. Raney*, 633 F.3d 385, 392 n.2 (5th Cir. 2011) (reaffirming *Miller*, 146 F.3d 274).

II. The Question Presented Is Critically Important To The Administration Of Criminal Justice.

It is critical that this Court clarify the law surrounding the innumerable traffic stops that occur every day and the viability of criminal prosecutions that arise from them.

1. Traffic stops are the single most common reason for citizen contact with the police. According to a recent Bureau of Justice Statistics study, at least 45 percent of the approximately 40 million Americans (18.8 million people) who have face-to-face contact with a police officer in a given year do so in the context of a traffic stop. U.S. Dep't of Justice, Bureau of Justice Statistics, Contacts Between Police and the Public, 2008, at 2-3 (2011).

In North Carolina alone, police have carried out an average of 1.17 million stops per year during the past decade. Frank R. Baumgartner & Derek Epp, North Carolina Traffic Stop Statistics Analysis – Final Report to the North Carolina Advocates for Justice Task Force on Racial and Ethnic Bias 5 (2012). Roughly 450,000 of these stops resulted in police searches. *Id.* at 6.

2. Resolving whether a stop predicated on a reasonable but mistaken view of the law violates the

Fourth Amendment is essential to provide greater clarity to law enforcement agents, police departments, lawyers, and trial judges. Police officers and departments need to know whether they may conduct traffic stops only for actual state-law offenses, or whether their authority is even broader. Furthermore, the answer to this question dictates the admissibility of evidence seized pursuant to stops based on mistakes of law in as many as sixteen states. Fourteen state high courts have made clear, and two others have indicated, that their state constitutions require suppressing all evidence the police obtain from searches or seizures conducted in violation of the Fourth Amendment, even when the police acted in "good faith."[5]

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[5] The following state supreme courts have squarely rejected the good faith exception to the exclusionary rule: *State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990); *Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000); *Gary v. State*, 422 S.E.2d 426, 428 (Ga. 1992); *State v. Guzman*, 842 P.2d 660, 677 (Idaho 1992); *State v. Cline*, 617 N.W.2d 277, 283 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001); *Commonwealth v. Upton*, 476 N.E.2d 548, 554 n.5 (Mass. 1985); *State v. Canelo*, 653 A.2d 1097, 1102 (N.H. 1995); *State v. Johnson*, 775 A.2d 1273, 1282 (N.J. 2001); *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993); *People v. Bigelow*, 488 N.E.2d 451, 458 (N.Y. 1985); *State v. Carter*, 370 S.E.2d 553, 562 (N.C. 1988); *Commonwealth v. Edmunds*, 586 A.2d 887, 888 (Pa. 1991); *State v. Oakes*, 598 A.2d 119, 121 (Vt. 1991). Illinois law likewise precludes any good faith exception when, as here, the police lack a warrant. *People v. Krueger*, 675 N.E.2d 604, 606 (Ill. 1996). Two other state high courts have indicated, without expressly holding, that their constitutions preclude any good faith exception. *State v. Lopez*, 896 P.2d 889, 902 (Haw. 1995); *Garza v. State*, 632 N.W.2d 633, 640 (Minn. 2001).

Even within jurisdictions recognizing the good faith exception to the exclusionary rule enunciated in *United States v. Leon*, 468 U.S. 897 (1984), and its progeny, every court to hold that stops such as the one here violate the Fourth Amendment and to address whether such a holding requires suppression has held that it does. Specifically, the Seventh, Ninth, and Eleventh Circuits have held that officers' misinterpretations of ambiguous traffic statutes do not satisfy *Leon*'s "good faith" standard. *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Chanthasouxat*, 342 F.3d 1271, 1279-80 (11th Cir. 2003).[6]

3. Clarifying whether mistakes of law can support traffic stops is especially important in areas of the country where state high courts have adopted different approaches to this Fourth Amendment issue than have the federal courts of appeals covering the same jurisdiction. Such is the case in three states.

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[6] These circuit decisions predate this Court's ruling in *Davis v. United States*, 131 S. Ct. 2419 (2011), that evidence obtained from a search conducted in compliance with binding, but later abrogated, circuit precedent satisfies *Leon*'s "good faith" standard. But the Eleventh Circuit has held that reliance on a clear statement from the judiciary is different from a situation, as here, where the police make a mistake of law regarding a legal question that the courts have not previously addressed. *United States v. Davis*, 598 F.3d 1259, 1266-67 (11th Cir. 2010), *aff'd*, 131 S. Ct. 2419 (2011); *see also United States v. Johnson*, 457 U.S. 537, 562 (1982) (excluding evidence obtained from a search whose constitutionality was "unsettled" at the time it was conducted).

See State v. Louwrens, 792 N.W.2d 649 (Iowa 2010) (disagreeing with Eighth Circuit); *State v. Anderson*, 683 N.W.2d 818 (Minn. 2004) (same); *Moore v. State*, 986 So.2d 928 (Miss. 2008) (disagreeing with Fifth Circuit). This creates the "odd inconsistency" that evidence obtained from a stop based on a mistake of law is admissible in one sovereign's courts but not the other's. *See Louwrens*, 792 N.W.2d at 654. Creating a uniform approach to stops based on mistakes of law will eliminate such inconsistency and any undesirable forum shopping to which it may give rise.

III. This Case Is An Ideal Vehicle For Resolving The Conflict.

For two reasons, this case presents the right opportunity for this Court to address the issue whether a mistake of law alone may supply the reasonable suspicion necessary to make a traffic stop.

1. This case indisputably turns on a pure mistake of law. That is, the officers made a mistake concerning the number of brake lights required by the statute, not a factual mistake concerning whether petitioner's vehicle had a properly functioning brake light. Moreover, because the State has never suggested that petitioner violated any other traffic law, this mistake of law was the only possible basis for the stop. Thus, this case is different than one where an officer, despite harboring a misunderstanding concerning the particular statute giving rise to the stop, nonetheless observed facts that could provide a basis for the stop. *See, e.g.*, *United States v. Wallace*, 213 F.3d 1216, 1217 (9th Cir. 2000) ("Although the officer misunderstood the tinting law, he was correct that the tinting he saw was illegal, and accordingly, had probable cause to

stop the car."); *State v. Barnard*, 658 S.E.2d 643, 644 (N.C. 2008) (conduct indicated violation of a different statute).

2. The question presented is outcome-determinative in petitioner's case. North Carolina is one of the states whose constitution precludes any good faith exception to the exclusionary rule. *State v. Carter*, 370 S.E.2d 553, 562 (N.C. 1988). Accordingly, as the North Carolina Court of Appeals' opinion makes clear, if the traffic stop violated the Fourth Amendment, then the drugs and other evidence the police seized during the stop must be suppressed and petitioner's conviction must be reversed. Pet. App. 39a-40a.

IV. The North Carolina Supreme Court Erred In Holding That A Mistaken Understanding Of The Law Can Support A Traffic Stop.

Contrary to the North Carolina Supreme Court's holding, a traffic stop contravenes the Fourth Amendment when the officer's decision to make the stop is based on a "subjective mistake of law" as to the existence of a traffic violation, regardless of whether that mistake is "reasonabl[e]," Pet. App. 8a.

A. A Traffic Stop Violates The Fourth Amendment When The Traffic Code, As Properly Construed, Does Not Provide Any Objective Basis For The Stop.

A straightforward application of this Court's precedent demonstrates that mistakes of law cannot support traffic stops.

1. The constitutionality of a traffic stop depends on whether the facts observed by the officer support at least reasonable suspicion that a traffic law (or some other law) was violated. *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). In order to apply this standard, a court must make two distinct inquiries. The court first must determine what the law at issue requires or prohibits. Second, the court must assess whether the facts observed by the officer establish a sufficient likelihood that a law was broken. Thus, this Court has described the validity of a seizure as turning on "whether the rule of law as applied to the established facts is or is not violated." *Ornelas*, 517 U.S. at 697 (internal quotation marks and citation omitted).

In *Whren v. United States*, 517 U.S. 806 (1996), this Court further clarified that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. "[A]s long as the circumstances, viewed objectively, justify [the police officer's] action," the officer's subjective state of mind is irrelevant. *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 136, 138 (1978)).

The logic of *Whren* is inherently two-sided: if an officer's subjective motive or belief cannot invalidate an objectively justified traffic stop, then it cannot save an objectively unjustified one. In other words, *Whren* grants officers "broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justification for their actions. But the flip side of that leeway is that the legal justification must be objectively grounded." *United States v. Miller*, 146 F.3d 274,

279 (5th Cir. 1998) (footnote omitted). Where the actions the officer observes provide no basis for concluding that any law, as properly construed, has been violated, an officer's subjective misunderstanding of the law cannot create the suspicion the Fourth Amendment requires.

The Eighth Circuit, whose approach the North Carolina Supreme Court endorsed here, Pet. App. 12a, has tried to finesse this problem by asserting that even under its view, an officer's "subjective good faith belief about the content of the law is irrelevant," *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006). According to the Eighth Circuit, "the constitutionality of [a] traffic stop . depends on whether [the officer's] belief that a state law was violated was objectively reasonable." *Id.*; *accord United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005). But conceptualizing the test in this manner reveals an even more fundamental flaw in the minority view.

Ordinary people are charged with knowledge of substantive criminal law, and if they make mistakes of law, they may not (absent special statutory exceptions) assert such mistakes as a defense to liability. This is so no matter how "objectively reasonable" a mistake may be. As this Court has put it time and again, "ignorance of the law is no excuse." *Bryan v. United States*, 524 U.S. 184, 196 (1998). Indeed, as Justice Holmes famously explained, "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey." Oliver Wendell Holmes, The Common Law 48 (1881).

It takes little reflection to see "the fundamental unfairness" of holding citizens to strict compliance with the law "while allowing those entrusted to enforce the law" to interpret and apply the law more flexibly. *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (internal quotation marks omitted). "Reciprocal expectations of law-abidingness between government and its citizens can scarcely be expected to endure if one party – the government – need not uphold its end of the bargain." Wayne A. Logan, *Police Mistakes of Law*, 61 Emory L.J. 69, 91 (2011) (footnotes omitted). Indeed, if anything, those charged with enforcing the law should be expected to have a better – not worse – understanding than the general public. Any rule that undermines this actuality, and that rewards police officers with more authority when they are ignorant of the law they are supposed to be enforcing, flouts our most basic constitutional values.

2. To be sure, this Court has held that an officer's "good faith" belief that a search or seizure was lawful can be relevant to determining whether to *suppress* illegally obtained evidence. In a series of cases beginning with *United States v. Leon*, 468 U.S. 897 (1984), this Court has held that evidence need not be suppressed when the police obtain it in "objectively reasonable reliance" on a state statute later held unconstitutional, *Illinois v. Krull*, 480 U.S. 340, 342, 349-50 (1987), or on binding, but later abrogated, appellate precedent, *Davis v. United States*, 131 S. Ct. 2419, 2434 (2011).

But exclusion "is an issue separate from the question whether the Fourth Amendment rights of the party . were violated." *Leon*, 468 U.S. at 906

(quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)) (internal quotation marks omitted). In none of the *Leon* "good faith" cases has this Court ever suggested that good faith goes to the question whether the Fourth Amendment was violated in the first place. To the contrary, in each of the cases in which this Court has held that the good faith exception did not require suppression, it has nonetheless taken it as a given that the Fourth Amendment was violated. *See, e.g.*, *Davis*, 131 S. Ct. at 2428 (noting that the search "turned out to be unconstitutional"); *Krull*, 480 U.S. at 347 ("evidence [wa]s obtained in violation of the Fourth Amendment"). In short, if police officers base their searches or seizures on conceptions of the law that turn out to be incorrect, their actions are, by definition, "unreasonable" under the Fourth Amendment.[7]

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[7] The North Carolina Supreme Court ignored *Davis*, *Krull*, and *Leon*, focusing instead on this Court's holding in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), that an arrest for violating an ordinance that was later declared unconstitutional did not violate the Fourth Amendment. *See* Pet. App. 12a. But even if relying on a local law later deemed unconstitutional were the same as relying on a misunderstanding of local law, *DeFillippo* is a relic of an earlier time, when this Court "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule." *Arizona v. Evans*, 514 U.S. 1, 13 (1995). Even though cast in some places as a Fourth Amendment decision, the reasoning in *DeFillippo* really focused on whether "the evidence discovered in the search of respondent should have been suppressed." *DeFillippo*, 443 U.S. at 38-40 & n.3; *compare Davis*, 131 S. Ct. at 2427 (explaining that deterrence and other factors considered in *DeFillippo* are relevant to whether the exclusionary rule applies, not to whether the Fourth Amendment was violated).

B. The North Carolina Supreme Court's Rationales For Permitting Stops Based On Mistakes Of Law Do Not Withstand Scrutiny.

The North Carolina Supreme Court offered two primary justifications for holding that a so-called "reasonable mistake of law" can support a traffic stop: (1) "the primary command of the Fourth Amendment" is merely "that law enforcement agents act reasonably," Pet. App. 12a; and (2) allowing traffic stops based on reasonable but incorrect understandings of law furthers society's "interest in keeping its roads safe" at a "minimal" cost to motorists, *id.* 14a.

1. Petitioner accepts that the police officers' mistake of law here was understandable, insofar as an officer understandably might not have known at the time of the stop that North Carolina law required only one working brake light instead of two. But that does not mean that this mistake was capable of providing "reasonable suspicion" under the Fourth Amendment. Unlike mistakes of fact, the Fourth Amendment does not tolerate police mistakes of law.

a. The reasonable suspicion standard condones traffic stops based on factual suppositions that turn out to be incorrect because "many situations which confront officers in the course of executing their duties are more or less ambiguous," and "law enforcement officials must be expected to apply their judgment" to draw factual inferences based on probabilities. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (internal quotation marks and citation omitted). Furthermore, officers often must form and apply their judgment in a "necessarily swift" manner

based on rapidly developing "on-the-spot observations." *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *see also United States v. Robinson*, 414 U.S. 218, 235 (1973) (stressing need for "quick *ad hoc* judgment" by officers). The reasonable suspicion standard thus reduces the "quantum of evidence" necessary to justify traffic stops and certain other police actions. *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4 (1987). Officers need ultimately not be correct; their factual predictions need only be "reasonable."

This reasoning does not apply to mistakes of law. In contrast to factual assessments, an officer's comprehension of the law should be formed ahead of time and with the opportunity to clarify any uncertainty. The question whether a traffic law prohibits certain conduct does not depend on police judgment or the amount of evidence that is available to them; it turns on what the traffic code says and what courts interpret the code's words to mean. Accordingly, mistakes of law, no matter how understandable, "cannot" give rise to "the objectively reasonable grounds for providing reasonable suspicion." *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006) (internal quotation marks and citation omitted). Only correct interpretations of law can provide a basis for such suspicion.

b. A rule allowing stops based on reasonable mistakes of law would also be difficult to administer. The Eighth Circuit's cases implementing this rule suggest that "police manuals or training materials, state case law, legislative history, or any other state custom or practice" can establish a mistake's reasonableness. *Washington*, 455 F.3d at 828; *see also Martin*, 411 F.3d at 1001 (noting the absence of

evidence regarding "prior enforcement" and "the training of police").

This Court's decision in *Whren*, however, expressly precluded courts from considering local "police enforcement practices" when determining whether reasonable suspicion existed. 517 U.S. at 814-15. Such practices are bound to "vary from place to place and from time to time," even among counties or agencies within the same jurisdiction, and this Court refused to "accept that the search and seizure protections of the Fourth Amendment are so variable." *Id.* at 815. So too here. Looking to local manuals and customs to determine whether a mistake of law was reasonable would yield impermissible variability in the protections of the Fourth Amendment within a given state.

2. Nor do the North Carolina Supreme Court's assertions concerning the limited intrusiveness and supposed public-safety goals of traffic stops support its mistake-of-law holding.

a. Contrary to the North Carolina Supreme Court's suggestion that a traffic stop "is not a substantial interference with the detained individual," Pet. App. 14a, this Court has long made clear that a traffic stop is a significant Fourth Amendment event. It involves a "physical and psychological intrusion visited upon the occupants." *Prouse*, 440 U.S. at 657. Traffic stops "interfere with freedom of movement, are inconvenient, and consume time" and they "may create substantial anxiety." *Id.*

Insofar as such stops are less intrusive than other kinds of seizures, the Fourth Amendment already accounts for the lesser degree of intrusion by reducing the quantum of suspicion needed for officers

to pull over motorists; reasonable suspicion instead of probable cause will suffice. *Id.* at 661, 663. The comparatively modest intrusion involved, however, does not remove the need for *some* legitimate suspicion.

b. The North Carolina Supreme Court's remarks concerning society's "interest in keeping its roads safe," *see* Pet. App. 14a, similarly miss the mark.

The officer here stopped petitioner's car because he believed it was violating state traffic law, not for independent safety reasons. Pet. App. 5a. When police officers conduct stops for violating traffic laws, these stops are valid only if supported by reasonable suspicion. *See Whren*, 517 U.S. at 811-12. Any purported safety justification for the stop – or for the state law purportedly being enforced – does not alter the Fourth Amendment calculus. After all, most every state law (traffic and otherwise) serves some underlying safety function. Only when officers act strictly in a community caretaking capacity, free from any investigatory purpose, does public safety become relevant. *Id.*; *see also South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

Indeed, the North Carolina Supreme Court's assertion that safety considerations should entitle police officers "to interpret our motor vehicle laws reasonably" (but incorrectly), Pet. App. 14a, would effectively allow police officers to redefine the content of the traffic code. This would usurp the role of legislatures and courts. If the governmental branches designated to make and interpret laws do not believe that certain conduct is sufficiently unsafe to be unlawful (and, by implication, to justify pretextual stops under *Whren*), then police officers

have no basis to second-guess that decision. Here, the North Carolina legislature determined that one working brake light, not two, was the appropriate standard for safety. The responsibility of law enforcement was to learn and apply that rule, not re-interpret it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 13, 2013

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

No. 380PA11

FILED 14 DECEMBER 2012

STATE OF NORTH CAROLINA

v.

NICHOLAS BRADY HEIEN

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 714 S.E.2d 827 (2011), reversing an order signed on 25 March 2010 by Judge Vance Bradford Long and vacating judgments entered on 26 May 2010 by Judge A. Moses Massey, both in Superior Court, Surry County. Heard in the Supreme Court on 7 May 2012.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Michele Goldman for defendant-appellee.

NEWBY, Justice.

In this case we must decide whether there was reasonable suspicion for the stop that led to defendant's convictions for attempting to traffic in cocaine by transportation and possession. After reviewing the totality of the circumstances, we conclude that there was an objectively reasonable

basis to suspect that illegal activity was taking place. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for additional proceedings.

On the morning of 29 April 2009, Sergeant Matt Darisse of the Surry County Sheriff's Department performed a routine traffic stop of a vehicle in which defendant was a passenger. Sergeant Darisse was observing traffic on Interstate 77 when he noticed a Ford Escort approach a slower moving vehicle, forcing the driver of the Escort to apply the car's brakes. When the driver engaged the brakes, Sergeant Darisse saw that the right rear brake light failed to illuminate. As a result, Sergeant Darisse decided to stop the Escort. As the Escort rolled to a stop, Sergeant Darisse noticed the right rear brake light "flickered on." Sergeant Darisse informed the driver, Maynor Javier Vasquez, that he stopped the car "for a nonfunctioning brake light." After a few moments of conversation Sergeant Darisse informed Vasquez that he would issue a warning citation for the brake light if Vasquez's drivers' license and registration were valid. After learning that his drivers' license and registration checked out, Sergeant Darisse returned Vasquez's documents and gave him a warning ticket for the brake light.

During the stop Sergeant Darisse apparently began to suspect that the Escort might contain contraband. During conversation Vasquez informed Sergeant Darisse that defendant and he were travelling to West Virginia. Defendant, however, offered differing information regarding their ultimate destination. He stated that the duo were headed to

Kentucky to pick up a friend. Based in part on this conflicting information, Sergeant Darisse decided to ask Vasquez if he could search the vehicle. Vasquez had no objection, but explained it was defendant's Escort so Sergeant Darisse should ask defendant. Sergeant Darisse then received defendant's permission to search the vehicle.

A search of the vehicle revealed, among other things, cocaine. According to Sergeant Darisse, he found "a cellophane wrapper with a white powder residue" in the door panel on the driver's side and "burnt marijuana seeds in the ashtray." Sergeant Darisse then searched a blue duffle bag in the "back hatch" area of the Escort. In "one of the side compartments" of the bag, Sergeant Darisse located "a white plastic grocery bag" containing "a sandwich bag wrapped in a paper towel." He discovered inside "the sandwich bag . . a white powder[ed] substance [that] appeared to be cocaine." A field test of the white, powdered substance indicated that it was, in fact, cocaine. Both the driver and defendant were then arrested and charged with trafficking in cocaine.

Defendant sought to suppress the evidence obtained during the search of the Escort, alleging that the stop was an illegal seizure in violation of the Fourth Amendment to the United States Constitution and Sections 19 and 20 of Article I of the North Carolina Constitution. Apparently, defendant argued that our General Statutes require a vehicle neither to have all brake lights in good working order nor to be equipped with more than one brake light, and, as a result, a traffic stop for the reason asserted here should be unconstitutional.

When the traffic stop at issue in this case occurred, Chapter 20 of our General Statutes, which addresses motor vehicles, contained several sections regulating vehicle brake lights. First, section 20-129 required that "[e]very motor vehicle have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle." N.C.G.S. § 20-129(d) (2009). That section also mandated, in language perhaps familiar when the provision was first enacted more than a half century ago, that "[n]o person shall sell or operate on the highways of the State any motor vehicle . unless it shall be equipped with a stop lamp on the rear of the vehicle. The stop lamp . shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps." *Id.* § 20-129(g) (2009). Second, section 20-129.1 provided that "[b]rake lights (and/or brake reflectors) on the rear of a motor vehicle shall have red lenses so that the light displayed is red." *Id.* § 20-129.1(9) (2009). Finally, section 20-183.3 also dictated that a motor vehicle safety inspection include a determination that the lights required by sections 20-129 or 20-129.1 are present and in a safe operating condition. *Id.* § 20-183.3(a)(2) (2009).

The trial court denied defendant's motion to suppress. The trial court found, among other things, that

> Darisse observed the right brake light of the vehicle not to function as the left brake light of the vehicle came on as the subject vehicle

slowed. Darisse upon making this observation, activated his blue light and instigated a stop of the subject vehicle.

The subject vehicle's right brake light was not functioning at the time of the instigation of the stop by observation of the video, taken from Darisse's patrol car, which began at the time of the instigation of the stop.

Immediately prior to the vehicle coming to a complete stop on the shoulder the right brake light flickered on.

Based on its findings the trial court concluded, *inter alia*, that Sergeant Darisse had a "reasonable and articulable suspicion that the subject vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light" and "that the seizure was constitutionally valid."

The Court of Appeals disagreed with the trial court's determination that all vehicular brake lights must function properly. *State v. Heien*, ___ N.C. App. ___, ___, 714 S.E.2d 827, 829-31 (2011). The Court of Appeals, addressing a novel issue of statutory interpretation, employed a long statutory analysis and then held that Chapter 20 requires a motor vehicle to have only one brake light. *Id.* at ___, 714 S.E.2d at 829-31. That court explained that section 20-129 requires only "'*a*'" brake light. *Id.* at ___, 714 S.E.2d at 829 (quoting N.C.G.S. § 20-129(g) (emphasis added)). The court observed that the brake light "'may be incorporated into a unit with *one* or more other rear lamps.'" *Id.* at ___, 714 S.E.2d at 829 (quoting

N.C.G.S. § 20-129(g) (emphasis added)). Given the "use of the articles 'a' and 'the' before the singular" term "stop lamp," which is used to describe a brake light throughout the statutes, the Court of Appeals reasoned that subsection 20-129(g) requires only one brake light. *Id.* at ___, 714 S.E.2d at 829. Further, the court determined that the mandate of section 20-129 that vehicles "'have all originally equipped rear lamps or the equivalent in good working order'" does not apply to brake lights because brake lights are distinct from rear lamps. *Id.* at ___, 714 S.E.2d at 830 (quoting N.C.G.S. § 20-129(d)). Finally, the Court of Appeals explained that the vehicle inspection statute does not alter the number of brake lights required by section 20-129. *Id.* at ___, 714 S.E.2d at 831.

Then, relying on its decision in *State v. McLamb*, 186 N.C. App. 124, 649 S.E.2d 902 (2007), *disc. rev. denied*, 362 N.C. 368, 663 S.E.2d 433 (2008), the Court of Appeals held that the traffic stop was unconstitutional. *Heien*, ___ N.C. App. at ___, 714 S.E.2d at 829-31. The court explained that at the time of the stop "there was no violation of N.C.G.S. § 20-129(g), N.C.G.S. § 20-129(d), or N.C.G.S. § 20-183.3." *Id.* at ___, 714 S.E.2d at 831. As a result, the court reasoned that "[b]ecause the initial stop was based upon Sergeant Darisse's observation that the right brake light of the vehicle malfunctioned, the justification for the stop was objectively unreasonable, and the stop violated [d]efendant's Fourth Amendment rights." *Id.* at ___, 714 S.E.2d at 831 (citing *McLamb*, 186 N.C. App. at 127-28, 649 S.E.2d at 904). Essentially, the court held that a police officer's mistaken belief about the requirements of the

substantive traffic law is per se objectively unreasonable. And, when the factual circumstances fail to indicate a violation of the substantive law as interpreted by a reviewing court, the stop of an individual is unconstitutional.

We allowed the State of North Carolina's Petition for Discretionary Review. *State v. Heien*, __ N.C. __, 720 S.E.2d 389 (2012). It is important to note at the outset that the State of North Carolina has chosen not to seek review of the Court of Appeals' statutory interpretation. Accordingly, how many brake lights are required by our General Statutes and whether they must be in good working order are issues not presented to this Court; for purposes of our decision, we assume that the Court of Appeals correctly held that our General Statutes require only one brake light and that not all originally equipped brake lights must function properly. It is also worth noting that, were driving with an improperly functioning brake light a traffic violation then, without question, Sergeant Darisse would have had, at least, reasonable suspicion to conduct the stop. *E.g.*, *State v. Styles*, 362 N.C. 412, 417, 665 S.E.2d 438, 441 (2008) ("Officer Jones' observation of defendant's traffic violation gave him the required reasonable suspicion to stop defendant's vehicle."). Indeed, a routine traffic stop by an officer who observes an individual commit a traffic violation is supported by probable cause. *E.g.*, *Whren v. United States*, 517 U.S. 806, 819 (1996). The question remains, however, whether an officer's mistake of law may nonetheless give rise to reasonable suspicion to conduct a routine traffic stop.

The issue presented in this case is one of first impression for this Court; however, considering a related question in *State v. Barnard*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, 555 U.S. 914 (2008), we held that an officer's mistake of law will not invalidate a stop otherwise supported by reasonable suspicion to believe an actual law was being violated. In *Barnard* a police officer observed an individual, who was operating a vehicle that had stopped for a red light, and then remained stopped for approximately thirty seconds after the light turned green before making a legal left turn. *Id.* at 245, 658 S.E.2d at 644. The officer decided to stop the vehicle based in part on "a perceived, though apparently non-existent, statutory violation of impeding traffic." *Id.* at 248, 658 S.E.2d at 645. At the suppression hearing the officer testified also that remaining stopped for thirty seconds after a light turns green "definitely would be an indicator of impairment." *Id.* at 247, 658 S.E.2d at 645. This Court, citing *Whren* and *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999), for the proposition that the "constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation," concluded that because the circumstances present in the case "gave rise to a reasonable, articulable suspicion that defendant may have been driving while impaired, the stop of defendant's vehicle was constitutional." 362 N.C. at 248, 658 S.E.2d at 645-46. As a result, the rule in this state is that an officer's subjective mistake of law will not cause the traffic stop to be unreasonable when the totality of the circumstances indicates that there is reasonable suspicion that the person stopped is violating some other, actual law. *Id.* The question presented today is

whether a stop is likewise permissible when an officer witnesses what he reasonably, though mistakenly, believes to be a traffic violation but, this time, the conduct fails simultaneously to indicate another law is being violated. In other words, does the former still hold when the latter is absent?

Various federal and state courts have provided different answers to this question. Some courts hold that a police officer's mistaken interpretation of the applicable substantive law cannot give rise to reasonable suspicion to support a traffic stop. *E.g.*, *United States v. McDonald*, 453 F.3d 958, 961-62 (7th Cir. 2006) (stating that an officer's decision to stop a vehicle "based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable"); *State v. Anderson*, 683 N.W.2d 818, 823-24 (Minn. 2004) (en banc) (holding "that an officer's mistaken interpretation of a statute may not form the particularized and objective basis for suspecting criminal activity necessary to justify a traffic stop"). Other courts have held that an officer's mistake of law can form the reasonable suspicion required to justify a traffic stop, so long as the mistake is objectively reasonable. *E.g.*, *United States v. Sanders*, 196 F.3d 910, 913 & n.3 (8th Cir. 1999) (concluding a traffic stop was constitutional when the officer reasonably believed the individual was violating the traffic law, even though the officer's belief about the law's requirements may have been incorrect); *State v. Rheinlander*, 286 Ga. App. 625, 626, 649 S.E.2d 828, 829-30 (2007) ("'If the officer acting in good faith believes that an unlawful act has been committed, his actions are not rendered improper by a

later legal determination that the defendant's actions were not a crime according to a technical legal definition or distinction determined to exist in the penal statute. The question to be decided is whether the officer's motives and actions at the time and under all the circumstances, including the nature of the officer's mistake, if any, were reasonable and not arbitrary or harassing.'" (citation omitted)); *Moore v. State*, 2005-CT-02063-SCT (¶21), 986 So. 2d 928, 935 (Miss. 2008) (en banc) ("In other words, based on the totality of the circumstances with which Officer Moulds was confronted, including a valid, reasonable belief that [the defendant] was violating a traffic law, Officer Moulds had sufficient probable cause to pull [the defendant] over, although, as it turns out, Officer Moulds based his belief of a traffic violation on a mistake of law.").

Two cases from the federal circuit courts of appeals illustrate the varying approaches. In *United States v. Martin*, 411 F.3d 998 (8th Cir. 2005), the United States Court of Appeals for the Eighth Circuit confronted a situation similar to the one presently at bar. In *Martin* an officer observed that a vehicle's right brake light failed properly to illuminate when the vehicle's brakes were engaged. *Id.* at 1000. Believing that he was witnessing a violation of a traffic law, the officer stopped the vehicle and subsequently arrested the driver for a different, more serious crime. *Id.* As it turns out, the applicable statute appeared to require only one properly functioning brake light. 411 F.3d at 1001. The court, however, reasoned that the "determinative question is not whether Martin actually violated the Motor Vehicle Code by operating

a vehicle with one defective brake light, but whether an objectively reasonable police officer could have formed a reasonable suspicion that Martin was committing a code violation." *Id.* Then, pointing out that it was "'common knowledge'" in the region that multiple brake lights are required, and that the language of the applicable statute was "counterintuitive and confusing," the court determined that the officer had an objectively reasonable basis to believe he had witnessed a traffic violation and that the stop was constitutionally permissible. 411 F.3d at 1001-02. On the other hand, in *United States v. Chanthasouxat*, 342 F.3d 1271 (11th Cir. 2003), the United States Court of Appeals for the Eleventh Circuit concluded that there was no reasonable suspicion to stop a vehicle for lacking an inside rearview mirror because the city ordinance the officer believed had been violated did not actually require such an inside mirror. *Id.* at 1278-80. The court found that the officer's mistaken belief regarding the statute's requirements was reasonable because (1) his training instructed that such a mirror was required; (2) a magistrate had informed him that an inside mirror was necessary; and (3) he had "written more than 100 tickets for lack of an inside rearview mirror." *Id.* at 1279. The court explained, however, that "a mistake of law, no matter how reasonable or understandable, cannot provide reasonable suspicion to justify a traffic stop." *Id.*

Each court offered persuasive justifications for its decision. The Eleventh Circuit explained that its rule is consistent with the principle that any ambiguity or vagueness in a statute should not be used against a

defendant. *Chanthasouxat*, 342 F.3d at 1278-79. That reasoning is consistent with rationale from other courts, discussed approvingly by the Eleventh Circuit, indicating that to be permissible under the Fourth Amendment a stop must be objectively grounded in the actual, governing law. *Id.* at 1277-78 (citing *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000), and *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999)). The Eighth Circuit, on the other hand, reasoned that its view is in keeping with the foundational principle that an officer's actions must be "objectively reasonable in the circumstances." *Martin*, 411 F.3d at 1001 (citation and quotation marks omitted). Moreover, the court observed that courts "'should not expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney,'" *id.* (quoting *Sanders*, 196 F.3d at 913), or "a federal judge," *id.* That observation is perhaps somewhat supported by an earlier decision of the Supreme Court of the United States on a different, but related, issue. *See Michigan v. DeFillippo*, 443 U.S. 31, 37-40 (1979) (holding that the arrest of an individual for violating a city ordinance later found to be unconstitutional nonetheless complied with the Fourth Amendment, in part because the Court reasoned that the "enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws" and based on that reasoning, believed that "[a] prudent officer should not have been required to anticipate that a

court would later hold the ordinance unconstitutional").

We find the Eighth Circuit's reasoning to be more compelling. To begin, that rationale seems to us, as it did to the Eighth Circuit, to be consistent with the primary command of the Fourth Amendment – that law enforcement agents act reasonably. *See Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (noting that the purpose of the Fourth Amendment "is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions" (footnote call number, citations, and internal quotation marks omitted)). An officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances. As stated above, when an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment. So long as the officer's mistake of law is objectively reasonable, then, the Fourth Amendment would seem not to be violated. Accordingly, requiring an officer to be more than reasonable, mandating that he be perfect, would impose a greater burden than that required under the Fourth Amendment.

Moreover, the reasonable suspicion standard does not require an officer actually to witness a violation of the law before making a stop. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (holding that an officer can constitutionally make a stop after witnessing "a series of acts, each of them perhaps innocent in itself, but which taken together warrant[] further investigation"). That rule generally applies regardless of the particular

substantive law at issue, *Styles*, 362 N.C. at 414-16, 665 S.E.2d at 439-41, and results in part because *Terry* stops are conducted not only to investigate past crime but also to halt potentially ongoing crime, to thwart contemplated future crime, and, most importantly in these circumstances, to protect the public from potentially dangerous activity. *See* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.1(e), at 281 (4th ed. 2004) (footnotes omitted).

Indeed, because we are particularly concerned for maintaining safe roadways, we do not want to discourage our police officers from conducting stops for perceived traffic violations. A routine traffic stop, based on what an officer reasonably perceives to be a violation, is not a substantial interference with the detained individual and is a minimal invasion of privacy. In fact, it seems to us that most motorists would actually prefer to learn that a safety device on their vehicle is not functioning properly. And particularly when judged against society's countervailing interest in keeping its roads safe, we think it prudent to endorse the reasonable interpretation of our traffic safety laws. It would, at a minimum, work at cross-purposes if we were to require our law enforcement officers to narrowly interpret our traffic safety statutes when deciding whether to conduct a stop for fear that a possible subsequent prosecution for the violation could be imperiled. That approach would undermine our officers' important efforts in keeping our roads safe. And because we do not perceive such a Fourth Amendment requirement, we decline to create one.

For that reason we find the Eleventh Circuit's justifications inapposite. Police officers should be entitled to interpret our motor vehicle laws reasonably when conducting routine traffic stops. Of course, we are mindful that statutes may not be unconstitutionally vague and agree that it may be unreasonable to conduct a stop if the substantive statute is too vague. *Cf. DeFillippo*, 443 U.S. at 38 ("The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."). But concerns about the rules of construction regarding the substantive statutes at issue seem to us to be more applicable to the subsequent judicial interpretation of a statute and not to a routine traffic stop that needs to be based only on reasonable suspicion. A *post hoc* judicial interpretation of a substantive traffic law does not determine the reasonableness of a previous traffic stop within the meaning of the state and federal constitutions. Such a *post hoc* determination resolves whether the conduct that previously occurred is actually within the contours of the substantive statute. But that determination does not resolve whether the totality of the circumstances present at the time the conduct transpired supports a reasonable, articulable suspicion that the statute was being violated. It is the latter inquiry that is the focus of a constitutionality determination, not the former. Respectfully disagreeing with the Eleventh Circuit, we think the Fourth Amendment's reasonable suspicion standard is not offended by an officer's objectively reasonable mistake of law.

Furthermore, we note that a decision to the contrary would be inconsistent with the rationale underlying the reasonable suspicion doctrine. "[R]easonable suspicion" is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (citations and internal quotation marks omitted). And while "reasonable suspicion" is more than "an inchoate and unparticularized suspicion or hunch of criminal activity," *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citation and internal quotation marks omitted), "'some minimal level of objective justification'" is all that is demanded, *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984)). To require our law enforcement officers to accurately forecast how a reviewing court will interpret the substantive law at issue would transform this "commonsense, nontechnical conception" into something that requires much more than "some minimal level of objective justification." We would no longer merely require that our officers be reasonable, we would mandate that they be omniscient. This seems to us to be both unwise and unwarranted.

Our approach also preserves the historical nature of the inquiry into whether an officer's conduct satisfies the Fourth Amendment. The question of whether reasonable suspicion exists has historically been answered by considering the totality of the circumstances present in each individual case rather than on the basis of bright-line rules. As the Supreme

Court of the United States has observed, "The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *Sokolow*, 490 U.S. at 7 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). It follows then that if we were to treat an officer's reasonable mistake of law differently from other circumstances in the reasonable suspicion analysis, we would be declaring essentially that any legal mistake by police resulting in a traffic stop could violate our federal and state constitutions regardless of how objectively reasonable the police conduct. Such a rule would insert rigidity into a fluid concept, which we think inappropriate.

Endorsing disparate treatment of police mistakes of law would not only create a bright-line rule, but also alter the analysis courts employ to determine whether reasonable suspicion is present. The traditional constitutional inquiry is to determine whether a traffic stop is reasonable under all the circumstances. *United States v. Southerland*, 486 F.3d 1355, 1358 (D.C. Cir.) (citing *Whren*, 517 U.S. at 810), *cert. denied*, 552 U.S. 965 (2007). If one circumstance, such as whether the officer made an objectively reasonable mistake of law, proved to be dispositive, then the reasonable suspicion analysis would change. A new threshold question would develop – whether the police had correctly forecast how the reviewing court would interpret the applicable law. If, and only if, this question were answered in the affirmative would the traditional totality of the circumstances analysis follow. This framework would seem to be a departure from the traditional reasonable suspicion analysis.

Finally, our approach allows reviewing courts to treat all police mistakes the same. The Supreme Court of the United States does not demand factual accuracy from our police when determining whether reasonable suspicion exists. *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990) ("[I]n order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . is not that they always be correct, but that they always be reasonable."). Neither do the federal circuit courts of appeals. *See, e.g.*, *Chanthasouxat*, 342 F.3d at 1276 (collecting cases and observing that a "traffic stop based on an officer's incorrect but reasonable assessment of facts does not violate the Fourth Amendment"). Instead, reasonableness is all that is required. *E.g.*, *id.* at 1276-77. Of course, the federal circuits are divided on whether officers are permitted to make reasonable mistakes of law. We, however, find no constitutional requirement to distinguish between mistakes of fact and mistakes of law in this context. And, in part also because it is not always clear whether a mistake is one of fact or of law, *e.g.*, *United States v. Miguel*, 368 F.3d 1150, 1153-54 (9th Cir. 2004), we decline to create such a distinction in this state. We believe the correct rule is that so long as an officer's mistake is reasonable, it may give rise to reasonable suspicion.

Applying this rule to the facts of this case, we observe that the following objective circumstances were present at the time of the stop. Our General Statutes mandated that each "motor vehicle . have all originally equipped rear lamps or the equivalent in

good working order." N.C.G.S. § 20-129(d). Our legislature permitted a vehicle's brake lighting system to be "incorporated into a unit with one or more other rear lamps." *Id.* § 20-129(g). It is reasonable to read these two provisions of section 20-129 to say that, because it may be "incorporated into a unit with other rear lamps," *id.*, a brake light is a rear lamp which, like all "originally equipped rear lamps," must be kept "in good working order," N.C.G.S. § 20-129(d). Such a reading is particularly reasonable in light of both the federal requirement that a passenger vehicle maintain two red brake lights on the rear of the vehicle "at the same height, symmetrically about the vertical centerline, as far apart as practicable," 49 C.F.R. § 571.108, at S7.3.1 & Table I-a (2011), and the reference in N.C.G.S. § 20-129.1 to the required color of the lenses of multiple "brake *lights*," N.C.G.S. § 20-129.1(9) (emphasis added). When the stop at issue in this case occurred, neither this Court nor the Court of Appeals had ever interpreted our motor vehicle laws to require only one properly functioning brake light. Given these circumstances, Sergeant Darisse could have reasonably believed that he witnessed a violation of our motor vehicle laws when he observed that the Escort had an improperly functioning brake light.

After considering the totality of the circumstances, we conclude that there was reasonable, articulable suspicion to conduct the traffic stop of the Escort in this case. We are not persuaded that, because Sergeant Darisse was mistaken about the requirements of our motor vehicle laws, the traffic stop was necessarily unconstitutional. After all, reasonable suspicion is a "commonsense, nontechnical

conception[] on which reasonable and prudent men, not legal technicians, act," *Ornelas*, 517 U.S. at 695 (citations and internal quotation marks omitted), and the Court of Appeals analyzed our General Statutes at length before reaching its conclusion that the officer's interpretation of the relevant motor vehicle laws was erroneous. After considering the totality of the circumstances, we hold that Sergeant Darisse's mistake of law was objectively reasonable and that he had reasonable suspicion to stop the vehicle in which defendant was a passenger. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for additional proceedings.

REVERSED AND REMANDED.

* * * * *

Justice HUDSON dissenting.

Because the majority's opinion here significantly, and in my view unnecessarily, alters our Fourth Amendment jurisprudence by introducing subjectivity and vagueness into our Fourth Amendment analysis and effectively overruling this Court's prior precedent, I respectfully dissent.

As a starting point, there is no doubt in my mind that, when he stopped defendant's vehicle, Sergeant Darisse acted upon a reasonable belief that defendant violated the law by operating a vehicle with one malfunctioning brake light. It is my guess that, before the COA's surprising decision below, most citizens of this state believed that a malfunctioning brake light represented legal grounds for a traffic stop and a citation. This belief was the only reason given for the

stop; there was otherwise nothing to indicate that the vehicle, which was not being driven by defendant, was being operated improperly. The trial court's findings on denying defendant's motion to suppress remain unchallenged and are therefore binding on appeal. They include the finding that Sergeant Darisse activated his blue light upon observing "the right brake light of the vehicle not to function." The trial court then concluded that the officer had reasonable articulable suspicion that the vehicle and driver were violating laws by having a brake light that was not functioning properly. The Court of Appeals held that there was no violation of any of the applicable statutes, N.C.G.S. §§ 20-129(d), 20-129(g), and 20-183.3, and therefore no legal or constitutional basis for the stop.

In the Court of Appeals the State argued that the trooper "actually observed a violation of N.C.[G.S.] § 20-129(d)" and that "[d]efendant's reliance on 'mistaken belief' cases . is therefore misplaced." Defendant argued, and the Court agreed, that there was no violation of the statutes. It was neither argued nor held that the trooper had a "reasonable if mistaken belief," just whether there was or was not a violation of the statutes.

Instead of bringing to this Court the issue of statutory interpretation, the State presented its single issue to be reviewed as: "Did the Court of Appeals err in holding that a stop based on a mistaken belief is not objectively reasonable and cannot support reasonable suspicion to stop the vehicle?" This Court allowed review of an issue not decided by the Court of Appeals and has now opened a Pandora's box by approving of

the use of evidence obtained solely because of a traffic stop based upon an officer's mistake of law. I must respectfully dissent.

There are many problems with the majority's decision – it introduces subjectivity into what was previously a well-settled objective inquiry and creates an interpretive role regarding state statutes for police officers and police departments. The danger in adopting a new constitutional rule here is that this particular case seems so innocuous: *Of course* it is reasonable that an officer would pull over a vehicle for a malfunctioning brake light. But this new constitutional rule will also apply in the next case, when the officer acts based on a misreading of a less innocuous statute, or an incorrect memo or training program from the police department, or his or her previous law enforcement experience in a different state, or his or her belief in a nonexistent law.

There is ample precedent for the decision the majority could have made here, both in this state and in federal courts. This Court has repeatedly and recently stated that what an officer believes is irrelevant to Fourth Amendment analysis – only the objective facts and the actual law matter. In *State v. Barnard* we stated that it was "irrelevant" that the officer stopped the car for a perceived, but actually nonexistent, statutory violation, saying that "[t]he constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation." 362 N.C. 244, 248, 658 S.E.2d 643, 645-46, *cert. denied*, 555 U.S. 914 (2008). In *State v. Ivey* we invalidated a stop when the objective facts showed that there was no actual statutory violation. 360 N.C.

562, 565, 633 S.E.2d 459, 461-62 (2006), *abrogated on other grounds*, *State v. Styles*, 362 N.C. 412, 415 n.1, 665 S.E.2d 438, 440 n.1 (2008). The majority implicitly overrules both of these cases today.

While the majority quotes the United States Supreme Court's decision in *Ornelas v. United States* as if that decision supports its position, the Court in *Ornelas* actually said the precise opposite a few sentences after the quote in the majority opinion: When evaluating a stop based on reasonable suspicion, "the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts *is or is not violated*." 517 U.S. 690, 696-97 (1996) (emphasis added) (citation and quotation marks omitted). There is no room for reasonable mistakes of law under the *Ornelas* articulation of the rule; either the law was violated and the stop is reasonable, or the law was not violated and the stop is not reasonable. Under our law and the law according to the United States Supreme Court, it does not matter what the officer subjectively thinks the law is. What matters is whether the objective facts show an actual violation of the law.

Further, the majority supports its reasoning with case law from the Court of Appeals for the Eighth Circuit, *see United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005), and contrasts that decision with the reasoning in the Eleventh Circuit's decision in *United States v. Chanthasouxat*, 342 F.3d 1271, 1278-79 (11th Cir. 2003). Though the majority does not acknowledge so, it should be emphasized that the Eighth Circuit stands alone among the federal circuits on this issue. The First, Third, Fifth, Seventh, Ninth,

Tenth, Eleventh, and D.C. Circuits all apply some form of the rule that an officer's mistake of law cannot be the basis for reasonable suspicion, though many allow that a stop based on a mistake of law may be constitutional if it can be justified objectively notwithstanding the mistake of law. *See United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006), *cert. denied*, 549 U.S. 1237 (2007); *United States v. Mosley*, 454 F.3d 249, 260 n.16 (3d Cir. 2006); *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998); *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005); *Chanthasouxat*, 342 F.3d at 1279; *cf. United States v. Debruhl*, 38 A.3d 293, 299 (D.C. Cir. 2012) (noting that court's refusal to "lead this jurisdiction toward acceptance of the discredited 'mistake of law' justification for Fourth Amendment violations").[1] The Second, Fourth, and Sixth Circuits appear not to have decided the issue explicitly yet, though district courts in the Second Circuit apply the majority rule. *See United States v. Williams*, No. 11

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[1] Of note, a middle-of-the-road approach would alleviate the majority's concerns about a *per se* rule while preserving traditional Fourth Amendment protections. We could easily adopt a principle like that expressed in *United States v. Booker*: "Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional. A stop is lawful despite a mistake of law, however, if an objectively valid basis for the stop nonetheless exists." 496 F.3d 717, 722 (D.C. Cir. 2007), *vacated on other grounds*, 556 U.S. 1218 (2009) (citation and quotation marks omitted). In fact, this Court applied this exact reasoning, if less explicitly, in *State v. Barnard*. *See* 362 N.C. at 248, 658 S.E.2d at 645-46.

Cr. 228, 2011 WL 5843475, at *5 (S.D.N.Y. Nov. 21, 2011) (stating that "[a] mistake of law cannot provide objectively reasonable grounds for suspicion"); *see also United States v. McHugh*, 349 F. App'x 824, 828 n.3 (4th Cir. 2009) (per curiam) ("[W]e assume, without deciding, that an officer's reasonable mistake of law may not provide the objective grounds for reasonable suspicion to justify a traffic stop."); *United States v. Jones*, 479 F. App'x 705, 712 (6th Cir. 2012) ("This court has not yet answered whether an officer's objectively reasonable mistake of law can establish reasonable suspicion for a search or seizure."). While using an imprecise tool like circuit-counting to justify a position should be done with care, the overwhelming acceptance of the position directly opposite that taken by the majority today should give us all pause.

Most troubling is that this decision imports into our jurisprudence a concept we have expressly rejected. Allowing an officer's "reasonable mistake of law" to support a warrantless stop is the functional equivalent of a "good faith exception" for stops conducted in contravention of the law – as long as the officer acted in good faith, that is, he is reasonably unaware that his actions are inconsistent with the law, the illegality of the stop will not require suppression of the obtained evidence. In *State v. Carter*, 322 N.C. 709, 720-24, 370 S.E.2d 553, 560-62 (1988), this Court discussed at length the value of the exclusionary rule and the reason for this Court's rejection of a good faith exception to that rule.[2] One of

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[2] In 2011 the General Assembly created a statutory "good faith exception" in N.C.G.S. § 15A-974 and explicitly requested that this Court revisit *Carter*. Act of Mar. 8 2011, ch. 6, 2011 N.C.

those reasons is that "the exclusionary rule is responsible for the systematic, in-depth training of police forces in the law of search and seizure. It can be no part of our constitutional duties to signal a retreat from these salutary advances in constitutional compliance which have guided police practice in this state since 1937." 322 N.C. at 721, 370 S.E.2d at 560 (footnote call number omitted). Yet such a retreat is exactly what the Court embraces today.[3]

The majority's concern that we would be asking omniscience of our police if we invalidated this stop is overblown. We would merely be asking that our police be diligent in studying the law and remaining current on changes to the law, as I am certain they already are. While the majority claims that "we do not want to discourage our police officers from conducting stops for perceived traffic violations," it is entirely unclear to me how a rule invalidating stops not based on the law would chill traffic stops generally, and the majority does not elaborate other than to mention the "fear that a subsequent prosecution for the violation would be imperiled." Other decisions by this Court that have upheld traffic stops based on observations amounting

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Sess. Laws 10. This statute was enacted after this defendant's charges were filed; however, even in the statute, the exception requires that the good faith belief be "objectively reasonable." N.C.G.S. § 15A-974(a)(2) (2011).

[3] The same concern prompted the Ninth Circuit to reject exactly this argument in *United States v. Lopez-Soto*: "To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." 205 F.3d at 1106.

to "reasonable suspicion" illustrate how little it takes to satisfy this standard. *See, e.g.*, *State v. Otto*, ___ N.C. ___, ___, 726 S.E.2d 824, 828 (2012). Because officers (rightfully) face no punishment for a stop based on a mistake of law, and because there would be no prosecution at all absent the stop, this alleged "fear" is not very compelling. Our police forces consist of trained professionals who carefully apply the law as laid down by the General Assembly and who are fully capable of adapting to changes in the law.

By adopting the majority's rule, we are not only potentially excusing mistakes of law in the exceedingly rare case when the Court of Appeals divines a novel interpretation of a statute, but also those mistakes of law that arise from simple misreadings of statutes, improper trainings, or ignorance of recent legislative changes. There is simply no reason to go to such lengths here, especially when the General Assembly has recently spoken to clarify this issue, which will undoubtedly come before us in due course. This decision is not merely unnecessary here; it is premature in light of the recent amendment to N.C.G.S. § 15A-974.

The flaws in the majority's opinion are perhaps most apparent in its single statement that "[p]olice officers should be entitled to interpret our motor vehicle laws reasonably when conducting routine traffic stops." Separation of powers doctrine dictates otherwise: It is the legislature's job to write the law and the judiciary's job to interpret the law. The job of the police is to *enforce* the law as it has been written by the legislature and interpreted by the courts. Proper enforcement of the law requires accurate

knowledge of the law; as the Eleventh Circuit cogently noted in *United States v. Chanthasouxat*, to decide otherwise is to endorse "the fundamental unfairness of holding citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it." 342 F.3d at 1280 (internal citation and quotation marks omitted).

Had the State petitioned for review on the issues of statutory interpretation addressed by the Court of Appeals, we could have based our decision on such an interpretation. In my view, that would have been the more appropriate course, and one by which we could stand firm on the protections of the Fourth Amendment. Then the General Assembly, should it so desire, could rewrite the brake light statute to clearly require that all brake lights operate properly, which it could do with alacrity. Then our police officers could continue the long-standing practice of stopping cars with malfunctioning brake lights; stops like this one would be constitutional; and we would have avoided eviscerating the "objectively reasonable" standard of the Fourth Amendment, and of our own amended N.C.G.S. § 15A-974. Because the majority has taken this unnecessary route, I respectfully dissent.

CHIEF JUSTICE PARKER and JUSTICE TIMMONS-GOODSON join in this dissenting opinion.

APPENDIX B

COURT OF APPEALS OF NORTH CAROLINA

STATE of North Carolina

v.

Nicholas Brady HEIEN.

No. COA11-52.

Aug. 16, 2011.

McGEE, Judge.

Nicholas Brady Heien (Defendant) pled guilty to attempted trafficking in cocaine by transporting and by possession on 26 May 2010. The trial court determined Defendant's prior record level to be a Level I, and sentenced Defendant to two consecutive prison terms of ten months to twelve months. Defendant appeals.

Sergeant Matt Darisse (Sergeant Darissé), of the Surry County Sheriff's Office, testified that he was "conducting criminal interdiction" on Interstate Highway 77 (I-77) when he observed a passing vehicle (the vehicle) driven by a man who appeared to be "stiff and nervous." Sergeant Darisse pulled onto I-77, "observed the driving of the vehicle, and noticed that [the] vehicle approach[ed] a slower moving vehicle, appl[ied] its brakes[,] and [that] the right side brake light was out." Sergeant Darisse testified that, upon observing that the vehicle's right brake light was out, he "put [his] blue lights on to pull the vehicle over."

When Sergeant Darisse approached the vehicle, he told the driver, Maynor Javier Vasquez (Mr. Vasquez), that he had been "pulled . over for the brake light being out" and asked Mr. Vasquez to produce his

driver's license and registration. Defendant, the only passenger, was lying in the back seat of the vehicle. Because Mr. Vasquez appeared nervous and was slow to produce the requested documents, Sergeant Darisse asked Mr. Vasquez to step out of the vehicle and wait between the vehicle and Sergeant Darisse's patrol car while Sergeant Darisse checked Mr. Vasquez's license and registration.

Deputy Mark Ward (Deputy Ward), of the Surry County Sheriff's Office, arrived to assist Sergeant Darisse with the traffic stop. Deputy Ward briefly questioned Defendant about where Defendant and Mr. Vasquez were going. Defendant told Deputy Ward they were driving to Kentucky. Mr. Vasquez had already told Sergeant Darisse that he and Defendant were driving to West Virginia. Sergeant Darisse gave Mr. Vasquez a warning ticket for an improperly functioning brake light and returned Mr. Vasquez's license and registration. Sergeant Darisse testified that, at that point, Mr. Vasquez was free to leave. However, upon Sergeant Darisse's request, Mr. Vasquez consented to additional questioning. Sergeant Darisse asked Mr. Vasquez if he had any contraband in the vehicle. Mr. Vasquez replied that he did not. Sergeant Darisse then asked Mr. Vasquez if he could search the vehicle. Mr. Vasquez replied that, because the vehicle belonged to Defendant, Sergeant Darisse would have to ask Defendant.

Sergeant Darisse asked Defendant, who was still lying in the back seat, for consent to search the vehicle. Defendant consented to a search and exited the vehicle. Sergeant Darisse's search of the vehicle revealed cocaine.

Defendant filed a motion to suppress dated 21 January 2010 and an amended motion to suppress dated 4 March 2010, both of which the trial court denied in an order dated 25 March 2010. Defendant entered pleas of guilty to charges of attempted trafficking in cocaine by transportation and by possession, but Defendant reserved the right to appeal the denial of his motion to suppress. Defendant filed a petition for writ of certiorari which was granted by our Court on 14 September 2010.

Defendant first argues that the trial court erred by concluding that Sergeant Darisse's initial stop of the vehicle "was constitutional, as [Sergeant] Darisse had a reasonable and articulable suspicion that the vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light."

> Generally, an appellate court's review of a trial court's order on a motion to suppress "is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.

State v. Roberson, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (citations omitted). "[C]onclusions of law drawn from the findings of fact are . reviewable de novo." *Huyck Corp. v. Town of*

Wake Forest, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987) (citations omitted).

"A law enforcement officer may stop and briefly detain a vehicle and its occupants if the officer has reasonable, articulable suspicion that criminal activity may be afoot." *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009) (citation omitted). However, an officer's determination regarding potential criminal activity must be objectively reasonable, and an officer's mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable justification for a traffic stop. *See State v. McLamb*, 186 N.C. App. 124, 127-28, 649 S.E.2d 902, 904 (2007) (holding that an officer's mistaken belief that the defendant was speeding was not an objectively reasonable purpose for a traffic stop). A passenger in a vehicle which is stopped by a law enforcement officer is seized within the meaning of the Fourth Amendment to the United States Constitution, and may accordingly challenge the constitutionality of the initial stop. *See Jackson*, 199 N.C. App. at 239-41, 681 S.E.2d at 495-96.

In the present case, the trial court made an unchallenged finding of fact that Sergeant Darisse's initial stop of the vehicle was based upon his observation that "the right brake light of the vehicle [did] not function as the left brake light of the vehicle came on as the vehicle slowed." Defendant argues that Sergeant Darisse did not have reasonable, articulable suspicion to stop the vehicle because the stop was based upon the mistaken belief that the malfunctioning brake light constituted a violation of N.C. Gen. Stat. § 20-129(g). The State, however,

argues that Sergeant Darisse had reasonable, articulable suspicion to stop the vehicle because the malfunctioning brake light constituted a violation of N.C. Gen. Stat. § 20-129(d) and N.C. Gen. Stat. § 20-183.3. Based on the language of the statutes, we hold that the malfunction of a single brake light, where a vehicle has at least one functioning brake light, is not a violation of N.C.G.S. § 20-129(g), N.C.G.S. § 20-129(d), or N.C.G.S. § 20-183.3.

In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). Legislative purpose is first ascertained from the plain words of the statute. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Moreover, we are guided by the structure of the statute and certain canons of statutory construction. *See, e.g., Media, Inc. v. McDowell County*, 304 N.C. 427, 430-31, 284 S.E.2d 457, 461 (1981) ("statutes dealing with the same subject matter must be construed *in pari materia*"); *Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage"). *Electric Supply Co. v. Swain Electric [Electrical] Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991).

I. N.C. Gen. Stat. § 20-129(g)

Defendant contends that Sergeant Darisse mistakenly believed that the malfunctioning brake

light constituted a violation of N.C.G.S. § 20-129(g), which states:

> (g) No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with *a stop lamp* on the rear of the vehicle. *The stop lamp* shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. *The stop lamp* may be incorporated into a unit with *one* or more other rear lamps.

N.C. Gen. Stat. § 20-129(g) (2009) (emphasis added). Initially, we note that the language of N.C.G.S. § 20-129(g) demonstrates that the "stop lamp" required under that statute is synonymous with what is colloquially called a "brake light." *See* N.C.G.S. § 20-129(g) ("The stop lamp . shall be actuated upon application of the service (foot) brake.") Because Sergeant Darisse testified that the vehicle's "right side brake light was out[,]" and the trial court's 25 March 2010 order and both parties' briefs use the term "brake light," we will use the terms "brake light" and "stop lamp" interchangeably. The use of the articles "a" and "the" before the singular "stop lamp" throughout N.C.G.S. § 20-129(g) clearly conveys that, under the statute, only *one* stop lamp is required on the rear of a vehicle. Thus, the plain language of subsection (g) requires only one stop lamp on a vehicle.

In the present case, the trial court made an uncontested finding of fact that, at the time of the initiation of the traffic stop, "the left brake light of the vehicle came on as the vehicle slowed." Because the *left* brake light was functioning properly, there was no violation of N.C.G.S. § 20-129(g) at the time of the initial stop.

II. N.C. Gen. Stat. § 20-129(d)

The State argues, however, that Sergeant Darisse had reasonable, articulable suspicion to stop the vehicle because the malfunctioning right brake light constituted a violation of N.C.G.S. § 20-129(d), a subsection of the statute that requires "all originally equipped rear lamps or the equivalent [to be] in good working order[.]" In relevant part, N.C.G.S. § 20-129(a) and (d) provide:

> (a) When Vehicles Must Be Equipped.—Every vehicle upon a highway within this State shall be equipped with lighted rear lamps as required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in G.S. 20-134:
>
> (1) During the period from sunset to sunrise,
>
> (2) When there is not sufficient light to render clearly discernible any person on the highway at a distance of 400 feet ahead, or
>
> (4) At any other time when windshield wipers are in use as a result of smoke, fog, rain, sleet, or snow, or when inclement weather or environmental factors severely reduce the

> ability to clearly discern persons and vehicles on the street and highway at a distance of 500 feet ahead[.]
>
> . .
>
> (d) Rear Lamps. – Every motor vehicle shall have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle.

It is clear from the language of subsections (a) and (d) that the "rear lamps" provided for therein are separate and distinct from the "stop lamp" provided for in subsection (g). Rear lamps must be lighted during "the period from sunset to sunrise," when "there is not sufficient light to render clearly discernible any person on the highway at a distance of 400 feet ahead," and at "any other time when windshield wipers are in use as a result of smoke, fog, rain, sleet, or snow, or when inclement weather or environmental factors severely reduce the ability to clearly discern persons and vehicles on the street and highway at a distance of 500 feet ahead[.]" N.C.G.S. § 20-129(a)(1), (2) and (4). Additionally, rear lamps must "exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of [a] vehicle." N.C.G.S. § 20-129(d). From these statutory requirements, it is apparent that the purpose of rear lamps is to make a vehicle more visible to other drivers and pedestrians during times when visibility is otherwise reduced due to nighttime, inclement weather, or similar conditions.

In contrast to "rear lamps[,]" "a stop lamp" must "display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake." N.C.G.S. § 20-129(g). From the requirements of N.C.G.S. § 20-129(g), it is apparent that the purpose of a stop lamp is to notify drivers and pedestrians to the rear of a vehicle that the driver of that vehicle has applied that vehicle's foot brake and that that vehicle will accordingly reduce speed. Notably, this statutory purpose can be accomplished where a vehicle is equipped with a single stop lamp.

Moreover, the statutory requirements for rear lamps differ from those of stop lamps in several significant aspects. Unlike rear lamps, which must be lighted at night, during periods of inclement weather, and during other periods of reduced visibility, stop lamps are only required to be lighted "upon application of the service (foot) brake." *See* N.C.G.S. § 20-129(a); N.C.G.S. § 20-129(g). Rear lamps must be "visible under normal atmospheric conditions from a distance of *500 feet* to the rear of [a] vehicle." N.C.G.S. § 20-129(d) (emphasis added). A stop lamp, however, must be "visible from a distance of not less than *100 feet* to the rear [of a vehicle] in normal sunlight[.]" N.C.G.S. § 20-129(g) (emphasis added). Finally, there is no required method of actuation for rear lamps, but a stop lamp must be lighted "upon application of the service (foot) brake." *See* N.C.G.S. § 20-129(a), (d) and (g). Thus, as reflected by statutory requirements applicable to each, rear lamps and a stop lamp are distinct and the requirement for each is intended to serve a separate purpose within the statutory scheme.

Accordingly, the requirement of N.C.G.S. § 20-129(d) that "all originally equipped rear lamps or the equivalent [be] in good working order" is applicable only to the rear lamps provided for in N.C.G.S. § 20-129(a) and (d). There is no similar requirement, under N.C.G.S. § 20-129(g), that all originally equipped *stop lamps* be in good working order. In the present case, the trial court's uncontested finding of fact notes that the traffic stop was based upon Sergeant Darisse's observation that the vehicle's right brake light malfunctioned. The State's argument that, because the vehicle's right brake light malfunctioned, Sergeant Darisse had reasonable, articulable suspicion to stop the vehicle under N.C.G.S. § 20-129(d), is without merit.

III. N.C. Gen. Stat. § 20-183.3

The State also argues that the malfunctioning brake light constituted a "violation of the safety inspection requirements of N.C. Gen. Stat. § 20-183.3 [.]" N.C. Gen. Stat. § 20-183.3 (2009) provides, in relevant part:

> (a) Safety. – A safety inspection of a motor vehicle consists of an inspection of the following equipment to determine if the vehicle has the equipment required by Part 9 of Article 3 of this Chapter and if the equipment is in a safe operating condition:
>
> (2) Lights, as required by G.S. 20-129 or G.S. 20-129.1.

As explained above, N.C.G.S. § 20-129(g) only requires a vehicle to have a single functioning brake light. Moreover, N.C. Gen. Stat. § 20-129.1 (2009), which provides that "[b]rake lights on the rear of a motor vehicle shall have red lenses so that the light displayed is red[,]" does not alter the requirement of N.C.G.S. § 20-129(g) that a vehicle be equipped with *one* brake light. Thus, even assuming that a violation of the inspection requirement statute was possible under the facts of the present case, Sergeant Darisse could not have had a reasonable, articulable suspicion that the malfunctioning brake light constituted a violation of that statute.

In sum, at the time of the initial stop, there was no violation of N.C.G.S. § 20-129(g), N.C.G.S. § 20-129(d), or N.C.G.S. § 20-183.3. Because the initial stop was based upon Sergeant Darisse's observation that the right brake light of the vehicle malfunctioned, the justification for the stop was objectively unreasonable, and the stop violated Defendant's Fourth Amendment rights. *See McLamb*, 186 N.C. App. at 127-28, 649 S.E.2d at 904. Accordingly, the trial court erred in denying Defendant's motion to suppress and amended motion to suppress.

We note that the holding in this case, based upon the present language of the applicable statute, makes it clear that having a single operable brake light is legally sufficient, and that a vehicle having only one operable brake light is not a valid justification for a traffic stop. The statute at issue having been enacted several decades ago, retains an antiquated definition of a stop lamp, not reflecting actual vehicle equipment now included in most automobiles. We are well aware

that the role of our courts is to adjudicate the laws as enacted by the General Assembly, and only the General Assembly, as our State's policy-maker, can modify and update this outdated statutory language.

We need not address Defendant's second argument in light of our holding above. The trial court's order denying Defendant's motion to suppress and amended motion to suppress is reversed and its judgment is vacated.

Reversed and vacated.

Judges ERVIN and McCULLOUGH concur.

APPENDIX C

IN THE SUPREME COURT OF NORTH CAROLINA

No. 380A11-2

FILED 8 NOVEMBER 2013

STATE OF NORTH CAROLINA

v.

NICHOLAS BRADY HEIEN

On appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 741 S.E.2d 1 (2013), affirming an order signed on 25 March 2010 by Judge Vance Bradford Long and judgments entered on 26 May 2010 by Judge A. Moses Massey, all in Superior Court, Surry County, after the Supreme Court of North Carolina remanded the Court of Appeals' prior decision of this case, *State v. Heien*, ___ N.C. App. ___, 714 S.E.2d 827 (2011). Heard in the Supreme Court on 14 October 2013.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State.

Michele Goldman for the defendant-appellant.

PER CURIAM.

AFFIRMED.

APPENDIX D

No. COA11-52-2

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2013

STATE OF
NORTH CAROLINA

v.

NICHOLAS BRADY HEIEN

Surry County
Nos. 09 CRS 51417-51418

Appeal by defendant from order dated 25 March 2010 by Judge Vance Bradford Long and judgments entered 26 May 2010 by Judge A. Moses Massey in Surry County Superior Court. Heard in the Court of Appeals 24 May 2011 with opinion filed 16 August 2011, reversing and vacating the trial court's judgments. On remand from the North Carolina Supreme Court on 14 December 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Michele Goldman for defendant appellant.

McCULLOUGH, Judge.

Nicholas Brady Heien ("defendant") pled guilty to attempted trafficking in cocaine by transportation and possession in Surry County Superior Court in May 2010, preserving his right to seek review of the denial of his motion to suppress. The trial judge found defendant's prior record level to be Level I and sentenced defendant to ten to twelve months on each count with the sentence on the second count to be

served consecutively to the first. Defendant appealed to this Court ("*Heien I*"). That appeal resulted in our Court reversing defendant's conviction. In that case, this Court held that the traffic stop which led to defendant's arrest was not based on reasonable suspicion. The State successfully sought discretionary review of our decision. Our Supreme Court reversed and remanded to this Court so that the remaining issues raised by defendant could be addressed. This appeal addresses defendant's other challenges to the search which resulted in his conviction.

The events which led to defendant's arrest and conviction originated with a traffic stop initiated by Sergeant M.M. Darisse, an officer with the Surry County Sheriff's Department. The facts regarding this stop are more fully set forth in our initial opinion concerning defendant's case, *State v. Heien*, ___ N.C. App. ___, 714 S.E.2d 827 (2012) (*Heien I*), and our Supreme Court's opinion which reversed *Heien I*, *State v. Heien*, ___ N.C. ___, ___ S.E.2d ___ (filed 14 December 2012). The facts will not be repeated in this opinion except to the extent necessary to support this Court's rationale.

In this Court's initial decision concerning defendant's appeal, we reversed defendant's conviction on the basis of the officer's stop, which the lower court found to be valid. There the trial court stated, "[Sergeant] Darisse had a reasonable and articulable suspicion that the . vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light." In *Heien I*, this Court found, after an extensive statutory analysis, that the statute dealing with brake lights as

opposed to taillights, only required a vehicle to have one functioning brake light, and thus the officer's belief that defendant's vehicle must have two functioning brake lights was erroneous. That statute reads:

> (g) No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a *stop lamp* on the rear of the vehicle. The *stop lamp* shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The *stop lamp* may be incorporated into a unit with one or more other rear lamps.

N.C. Gen. Stat. § 20-129(g) (2011) (emphasis added).

The State appealed and our Supreme Court ruled that the officer's traffic stop was objectively reasonable. *Heien I*, ___ N.C. ___, 714 S.E.2d 827. At the Supreme Court, the State accepted this Court's statutory interpretation in *Heien I*. Our Supreme Court stated:

> After considering the totality of the circumstances, we conclude that there was reasonable, articulable suspicion to conduct the traffic stop of the Escort in this case. We are not persuaded that, because Sergeant Darisse was mistaken about the requirements of our motor vehicle laws, the traffic stop was necessarily unconstitutional. After all,

> reasonable suspicion is a "commonsense, nontechnical conception[] . . . on which reasonable and prudent men, not legal technicians, act," *Ornelas*, 517 U.S. at 695 (citations and internal quotation marks omitted), and the Court of Appeals analyzed our General Statutes at length before reaching its conclusion that the officer's interpretation of the relevant motor vehicle laws was erroneous. After considering the totality of the circumstances, we hold that Sergeant Darisse's mistake of law was objectively reasonable and that he had reasonable suspicion to stop the vehicle in which defendant was a passenger. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for additional proceedings.

Heien, ___ N.C. at ___, ___ S.E.2d at ___.[1]

The case has now been remanded to this Court to address defendant's remaining challenge to the events leading up to his arrest. In defendant's Motion To Suppress, defendant argues:

> 10. No traffic charges were filed, and only a warning ticket was written. The continuation of the investigation after the motor vehicle stopped, including the questioning of the

---

[1] Interestingly, neither party briefed nor argued the applicability of N.C. Gen. Stat. § 12-3(1) which may affect statutory construction when the singular or plural is to be utilized. As the interpretation of N.C. Gen. Stat. § 20-129(g) is not before this Court, we decline to decide if this statute has any applicability.

Defendant, was not based on a reasonable articulable suspicion that criminal activity had been committed or was being committed.

11. The time that lapsed after Officer Darisse learned from the Department of Motor Vehicles computer that as to Mr. [V]asquez, " everything was valid on the license and registration " and wrote the warning ticket, constituted an unreasonably prolonged traffic stop and Defendant was unlawfully detained and his car unlawfully searched.

12. Under the totality of the circumstances the officers had no just cause to detain the Defendant, question him, or search his vehicle without a warrant.

13. The questioning and other investigation of the Defendant, the prolonged stop, and the search and seizure of Defendant and his property were in violation of the Fourth Amendment of the United States Constitution as the same is made applicable to the states, and are in violation of Article I, Sections 19 and 20 of the Constitution of the State of North Carolina.

II. SCOPE OF THE VEHICLE SEARCH

14. The alleged controlled substance was found inside a sandwich bag which was inside a paper towel which was inside a white grocery bag which was inside the side compartment of a duffle bag which was inside the vehicle. Neither Officer Darisse nor Officer Ward advised the Defendant that they were going to search his

> car for narcotics before he gave verbal consent. The Defendant was entitled to know the object of their search prior to giving consent. Had he known, he would have had the opportunity to place explicit limitations on the search. The failure of the officers to explain the object of the search violates Defendant's right to be free from unreasonable searches under the Fourth Amendment to the [United] States Constitution and Articles 19 and 20 of the Constitution of North Carolina, and evidence of items found inside the duffle bag and elsewhere inside the vehicle should be suppressed.

STANDARD OF REVIEW

In reviewing a trial court's order concerning a motion to suppress, this Court utilizes the following test:

> Generally, an appellate court's review of a trial court's order on a motion to suppress "is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.

State v. Roberson, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (citations omitted). "[C]onclusions of law drawn from the findings of fact are reviewable *de novo*." *Huyck Corp. v. Town of*

Wake Forest, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987) (citations omitted).

I. Length of Stop

Defendant argues that the traffic stop was unduly prolonged in his motion. Our analysis begins with the pertinent trial court's findings of fact:

> 8) Darisse upon instigating his blue lights, observed a head "pop up" out of the back seat of the subject vehicle and then disappear.
>
> 9) Darisse upon approaching the vehicle observed the defendant lying in the back seat of the vehicle.
>
> 10) Darisse observed the defendant lying in the back seat underneath a blanket. Darisse informed the driver of the vehicle that he was being stopped for a non-functioning brake light and asked the driver to step out to the rear of the vehicle. The driver complied. Darisse engaged in a brief conversation with the driver asking the driver if anything was wrong with the person in the back seat, from where the driver began travelling and his ultimate destination. The Driver informed Darisse that the defendant was tired and the pair were going to West Virginia. The driver was informed that the officer intended to issue him a warning citation so long as long documentation provided to Darisse was valid. Darisse took the driver's license

and registration then returned to his vehicle. Darisse formed the opinion that the driver appeared nervous to him as he made poor eye contact and he was continuously placing his hair in a ponytail and then removing his hair from a ponytail. Defendant continued to lie in the back of the vehicle and did so through the entire stop until he was later approached by Darisse.

11) Officer Ward arrived at the scene of the stop. Ward was informed by Darisse that a subject was lying in the back of the vehicle underneath a blanket. Ward went to the vehicle and asked defendant for his driver's license in order to determine his identity and check for outstanding warrants. The defendant complied and gave his driver's license to Ward without getting up from his position.

12) The driver continued to stand between Darisse's patrol car and the subject car as Ward asked for the defendant's driver's license.

13) The interaction between Ward and the defendant occurred in approximately one to two minutes.

14) The stop of the subject vehicle was initiated at approximately 7:55:40 a.m.

15) Darisse re-approached the driver and returned his driver's license and any other identifying documents he had

received and gave the driver a warning citation. Darisse then asked the driver if he would be willing to answer some questions. The driver indicated by nodding his head that he had no objection to answering questions and stated he would answer questions. Darisse's tone and manner with the driver of the vehicle was polite, non-confrontational and conversational.

16) The driver denied any type of contraband in the car.

17) The driver denied guns or large sums of cash in the car.

18) This conversation occurred within a period of a minute to two minutes.

19) Darisse then asked for permission to search the vehicle. The driver did not object to searching the vehicle, but informed Darisse that the vehicle was the defendant's, and Darisse should make the request of the defendant. Darisse approached the defendant who was still lying in the back of the vehicle and asked for permission to search the vehicle. The defendant informed Darisse that he had no objection to the vehicle being searched, although the officers might have a problem because the inside of the vehicle was messy.

20) The tone and manner of Darisse when asking for permission to search the

vehicle with the defendant was conversational, nonconfrontational and polite.

The Fourth Amendment to the United States Constitution as well as Article I, Section 20 of the North Carolina Constitution guarantee the right of people to be secure in their person and property, and free from unreasonable searches. *E.g.*, *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). A traffic stop is permitted if an officer has a reasonable articulable suspicion that there is criminal activity afoot or when a motorist commits a violation in his or her presence. *Heien*, ___ N.C. ___, ___ S.E.2d ___ In this case our Supreme Court has established that the traffic stop was permissible. The temporary detention of a motorist during a valid traffic stop is recognized as a seizure, but a permissible one, as it is considered reasonable. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). While it is recognized that the motorist is seized for constitutional purposes, roadside questioning during the encounter does not trigger the need for *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420 (1984). Once the purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay. *E.g.*, *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998). Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended. The fact that the documents have been returned does not mean that the officer loses all right to

communicate with the motorist. Thus, non-coercive conversation is still permitted. An officer may ask questions or request consent to search so long as the individual freely and voluntarily consents to answer questions or to allow his or her property to be searched. *State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (stating that, while it is true that "initial reasonable suspicion evaporated [upon return of defendant's documents], [the officer] was neither prohibited from simply asking if defendant would consent to additional questioning, nor was the officer prohibited from questioning defendant after receiving his consent"). So long as an individual is aware that he is free to leave or free to refuse to answer questions, there is no brightline rule requiring police to refrain from requesting consent to speak to an individual or request consent to search his or her person or property. *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 585-86 (1994) (citing *Florida v. Bostick*, 501 U.S. 429, 431 (1991)).

Here, the return of documentation would render the encounter between defendant and the officers consensual so long as a reasonable person would believe he was free to leave or refuse the request. *Kincaid*, 147 N.C. App. at 99, 555 S.E.2d at 299. The trial court found the encounter became consensual. The testimony and exhibits at the suppression hearing tend to support the trial court's findings of fact and conclusions of law; thus, we are required to uphold its determination that the defendant freely consented to the search as a

reasonable person in his position would not feel coerced under similar circumstances.

Here the encounter was not unduly prolonged. The trial court found that the traffic stop was initiated at 7:55:40 a.m. and that defendant gave his consent to search at 8:08 a.m. During that time the two officers, Ward and Darisse, had discussed the malfunctioning brake light with the driver, had discovered that the two claimed to be going to different destinations (West Virginia or Kentucky), and had observed that defendant engaged in rather bizarre behavior by lying down on the backseat under a blanket, even when approached by Officer Ward who requested his driver's license. After each person's name was checked for warrants, their licenses were returned. Defendant had his license back before the request to search was made. The trial court found that the officer's tone and manner were conversational and nonconfrontational. Both defendant and the driver were unrestrained during this encounter, no guns were drawn and neither individual was searched before the request to search the vehicle was made.

Based on this record we believe the trial court was entitled to conclude that defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. The dissent maintains that there is insufficient evidence in the record to sustain this conclusion, but there is no requirement that a defendant be explicitly informed of his right to refuse a request to search. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996).

The dissent seems to argue that this defendant was merely a passenger and, as such, would not feel free to leave or deny consent since the record does not establish that defendant knew the driver Vasquez had received his license and a warning ticket had been issued. This argument ignores the fact that defendant was not a mere passenger, but was the owner. It is uncontroverted that defendant's driver's license had been returned to him prior to the consent to search request. We believe that the trial court's conclusion that defendant consented to this search is reasonable and should be upheld, as we further believe a reasonable motorist or vehicle owner would understand that with the return of his license or other documents, the purpose of the initial stop had been accomplished and he was free to leave, was free to refuse to discuss matters further, and was free to refuse to allow a search.

II. Scope of Search

In his motion to suppress, defendant also asserts that the officer should have informed defendant that he was searching for narcotics so that defendant could have issued some limiting instructions. We find this argument unpersuasive. Just as there is no requirement for an officer to explicitly inform defendant of his right to refuse a search, there is no requirement that an officer inform defendant of what he is searching for. We believe that any reasonable person would understand the officer was searching for weapons, cash or contraband. The driver, Vasquez, was asked if any of those items were in the car. Additionally, defendant informed Darisse that it might

be difficult to search the vehicle as it was messy. We also believe both the driver and defendant were aware that the search would be somewhat detailed as the driver was asked to identify any objects that did not belong to him. Sergeant Darisse evidently began to search the vehicle and immediately found a bag of marijuana under the front seat and marijuana seeds in the ashtray. At this point, the officers had probable cause to search the entire vehicle as well as probable cause to arrest both the driver and defendant. The fact that defendant may have wished to limit the search became irrelevant. *See, e.g., Carroll v. U.S.*, 267 U.S. 132 (1925).

CONCLUSION

In the case at bar, defendant's automobile which was being driven by another individual, was properly stopped by officers of the Surry County Sheriff's Department while on routine traffic patrol. After the officer had issued a warning ticket for a nonfunctioning brake light and both persons had their driver's licenses returned, a request to search the vehicle was made. We conclude that on the record before the trial court there was ample evidence that a reasonable person would understand he was free to leave or refuse to consent to the request. The trial court concluded defendant consented to the search and the trial court's conclusion is supported by the evidence presented at the suppression hearing. Shortly after the search was initiated, probable cause to conduct a more detailed search and to arrest the occupants was obtained. We thus will uphold the trial court's conclusion that this was a consensual

encounter and affirm its denial of defendant's Motion To Suppress.

Affirmed.

Judge ERVIN concurs.

Judge McGEE dissents with a separate opinion.

No. COA11-52-2

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2013

STATE OF
NORTH CAROLINA

v.

NICHOLAS BRADY HEIEN

Surry County
Nos. 09 CRS 51417-51418

McGEE, Judge.

I respectfully dissent from the majority's conclusion that Defendant "freely consented" to the search of his vehicle, since that conclusion is contrary to binding precedent of our Court in *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

A crucial fact, found by the trial court, is that Defendant remained lying on the back seat inside his vehicle while officers questioned the driver, who stood outside Defendant's vehicle between an officer's patrol car and Defendant's vehicle. A crucial fact, not found by the trial court, is that Defendant knew the traffic stop was over when he consented to the search.

"When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . [A] passenger is seized as well and so may challenge the constitutionality of the stop."

State v. Hernandez, 208 N.C. App. 591, 597, 704 S.E.2d 55, 59 (2010) (alterations in original) (quoting *Brendlin v. California*, 551 U.S. 249, 251 (2007)). "Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual." *Jackson*, 199 N.C. App. at 241-42, 681 S.E.2d at 496.

First, we determine at what point the original purpose of the stop had been addressed by the officers. In *Jackson*, the officer stopped the vehicle on suspicion the driver was operating the vehicle without a license. *Jackson*, 199 N.C. App. at 238, 681 S.E.2d at 494. This Court concluded the detention was limited to "confirming or dispelling [the officer's] suspicion that [the driver] was operating his vehicle without a license." *Jackson*, 199 N.C. App. at 242, 681 S.E.2d at 496. The officer, however, continued the interrogation. *Id.*

> Such interrogation was indeed an extension of the detention beyond the scope of the original traffic stop as the interrogation was not necessary to confirm or dispel [the officer's] suspicion that [the driver] was operating without a valid driver's license and it occurred after [the officer's] suspicion that [the driver] was operating without a license had already been dispelled.

Jackson, 199 N.C. App. at 242, 681 S.E.2d at 496-97.

In this case, the original purpose of the stop was the brake light. The detention was limited to confirming or dispelling the suspicion that the brake light did not function. However, after the citation, an officer asked Defendant for consent to search. The request for Defendant's consent was not necessary to confirm or dispel suspicions regarding the brake light. The request to search extended the detention beyond the scope of the original traffic stop.

Second, we decide whether the delay was justified by determining if (1) the encounter between Defendant and the officers became consensual or (2) there were grounds for a reasonable and articulable suspicion. The trial court concluded "the encounter between the officers, [D]efendant and the driver, became a consensual encounter at the time the driver voluntarily agreed to answer questions, after the warning citation was delivered to the driver and both driver and [D]efendant had all documents returned."

"The test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter." *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 586 (1994). "[T]he return of documentation would render a subsequent encounter consensual only if a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." *State v. Kincaid*, 147 N.C. App. 94, 99, 555 S.E.2d 294, 299 (2001) (internal quotation marks omitted). The person at issue is this case is Defendant, not the driver. The trial court and the

majority conflate the perspectives of the driver and Defendant, resulting in the use of an erroneous standard.

"[A] passenger in a car that has been stopped by a lawenforcement officer is still seized when the stop is extended." *Jackson*, 199 N.C. App. at 240, 681 S.E.2d at 495. "A passenger would not feel any freer to leave when the stop is lawfully or unlawfully extended, especially where the officer was questioning the driver away from the vehicle while the passengers waited in the vehicle." *Id.*

No findings show or suggest Defendant was aware that an officer had issued a citation or that the officers had completed the investigation of the brake lights. In fact, the trial court found that Defendant remained in the back seat, inside the vehicle. A reasonable person under the same circumstances would not believe he was free to leave because, from Defendant's perspective inside the vehicle, the stop continued while the driver was questioned outside. Without a finding that Defendant was privy to the same information as the driver, this Court does not impute the driver's knowledge to Defendant.

Because Defendant consented during an unlawful seizure of his person, the consent was ineffective to justify the search. *See Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497; *Florida v. Royer*, 460 U.S. 491, 508 (1983).

The majority also considers the length of the delay, without holding it to be *de minimis*. To the extent the majority considers the delay's length, I must dissent because the issue is not preserved. Although the State

argues on appeal that (1) the delay was *de minimis* and (2) reasonable articulable suspicion existed to justify the delay, the State did not make such arguments at trial, and the trial court made no ruling on either issue.

An appellee may list proposed issues on appeal "based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 10(c) (2011). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2011). These alternative bases are not preserved for our review.

The majority analyzes a second issue, scope of the search, which Defendant did not argue to this Court. Because this issue regarding the scope of the search is not before us, I dissent from the majority as to its conclusion on that issue as well.

OPPOSITION BRIEF

No. 13-604

In the
Supreme Court of the United States

NICHOLAS BRADY HEIEN,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 2014

QUESTION PRESENTED

Whether a police officer's objectively reasonable mistake of law can provide reasonable suspicion sufficient to justify a traffic stop under the Fourth Amendment.

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The opinion of the Supreme Court of North Carolina is reported at *State v. Heien*, 737 S.E.2d 351 (N.C. 2012), and is reproduced in the appendix to the petition.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a) to review the opinion of the Supreme Court of North Carolina.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. IV.

STATEMENT

The Fourth Amendment permits a law enforcement officer to stop a motor vehicle when there is reasonable suspicion that a law has been violated. The North Carolina Supreme Court held in this case that a reasonable mistake of law, like a reasonable mistake of fact, can provide reasonable suspicion.

1. Early one morning in 2009, Sergeant Matt Darisse of the Surry County Sheriff's Department was observing traffic on Interstate 77 when he saw a Ford Escort in which petitioner was a passenger approach a slower moving vehicle. When the driver of the Escort

applied the car's brakes, the right rear brake light failed to illuminate. (Pet. App. 2a)

2. Sergeant Darisse stopped the Escort and informed the driver, Maynor Javier Vasquez, that he stopped the car "for a nonfunctioning brake light." Sergeant Darisse ultimately issued Vasquez a warning ticket for the brake light. (Pet. App. 2a)

3. During the stop, Sergeant Darisse apparently began to suspect the Escort could contain contraband. Because petitioner and Vasquez gave Sergeant Darisse conflicting information, Sergeant Darisse asked Vasquez if he could search the vehicle. Vasquez had no objection, but he said that Sergeant Darisse should ask petitioner because the vehicle belonged to him. Petitioner consented to the search. (Pet. App. 2a-3a)

4. A search of the Escort revealed cocaine. Both petitioner and Vasquez were charged with trafficking in cocaine. (Pet. App. 3a)

5. Petitioner filed a pretrial motion to suppress the evidence. The trial court denied the motion. (Pet. App. 3a-5a)

6. Petitioner, while reserving his right to appeal from the denial of his motion to suppress, pleaded guilty to two counts of attempted trafficking in cocaine and was sentenced to consecutive terms of ten to

twelve months imprisonment. On the same date, he gave notice of appeal. (Pet. App. 31a)

7. The North Carolina Court of Appeals reversed the denial of petitioner's motion to suppress, holding the officer's basis for stopping petitioner was not objectively reasonable because North Carolina law requires only one functioning brake light. *State v. Heien*, 714 S.E.2d 827, 831 (N.C. Ct. App. 2011).

8. The North Carolina Supreme Court subsequently granted discretionary review and reversed the decision of the North Carolina Court of Appeals, holding there was reasonable suspicion to stop petitioner's vehicle. *State v. Heien*, 737 S.E.2d 351, 359 (N.C. 2012).

9. On remand, the North Carolina Court of Appeals held petitioner's consent to search was valid. *State v. Heien*, 741 S.E.2d 1, 5-6 (N.C. Ct. App. 2013).

10. The North Carolina Supreme Court then affirmed the decision of the North Carolina Court of Appeals. *State v. Heien*, 749 S.E.2d 278 (N.C. 2013).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner contends a police officer's mistake of law can never be objectively reasonable or serve as the

basis for reasonable suspicion. Because this case is not an appropriate vehicle for resolving this relatively rare issue, petitioner has failed to show a compelling reason for this Court to grant certiorari.

I. THERE IS NOT A SIGNIFICANT CONFLICT AS TO THIS ISSUE.

Petitioner cites to a number of cases from various jurisdictions to support the existence of a conflict in the lower courts. Although there is a conflict, petitioner overstates the degree of that conflict.

Many jurisdictions reject the distinction between a mistake of law and a mistake of fact, directing their focus solely on the objective reasonableness of the officer's conduct. *See, e.g., United States v. Smart*, 393 F.3d 767, 770 (8th Cir.), *cert. denied*, 545 U.S. 1121 (2005); *United States v. Ramirez*, 115 F. Supp. 2d 918, 923 (W.D. Tenn. 2000), *aff'd sub nom. United States v. Moreno*, No. 01-5321, 2002 U.S. App. LEXIS 15398 (6th Cir. 2002); *Travis v. State*, 959 S.W.2d 32, 34 (Ark. 1998); *Stafford v. State*, 671 S.E.2d 484, 485 (Ga. 2008); *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008); *City of Bowling Green v. Godwin*, 850 N.E.2d 698, 702 (Ohio 2006); *State v. Wright*, 791 N.W.2d 791, 798-99 (S.D. 2010); *DeChene v. Smallwood*, 311 S.E.2d 749, 751 (Va.), *cert. denied*, 469 U.S. 857 (1984). On the other hand, there also are jurisdictions that distinguish between mistakes of law and mistakes of

fact, holding certain mistakes of law objectively unreasonable. *See, e.g.*, *United States v. Valadez-Valadez*, 525 F.3d 987, 991 (10th Cir. 2008); *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006), *cert. denied*, 549 U.S. 1237 (2007); *United States v. Chanthasouxat*, 342 F.3d 1271, 1276 (11th Cir. 2003).

Some decisions finding Fourth Amendment violations based on mistakes of law rest, however, on circumstances that are not present in the instant case, and their logic does not conflict significantly with the holding of the North Carolina Supreme Court. For example, some courts have found no objective basis for a stop where stops were based on an officer's mistaken belief that a state law existed covering the conduct when no such law existed. *See, e.g.*, *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Miller*, 146 F.3d 274, 278 (5th Cir. 1998). Other courts have found a lack of reasonable suspicion when stops were based on a mistaken and *unreasonable* reading of a valid state law. *See, e.g.*, *United States v. McDonald*, 453 F.3d 958, 960 (7th Cir. 2006); *United States v. Tibbetts*, 396 F.3d 1132 (10th Cir. 2005); *United States v. Twilley*, 222 F.3d 1092 (9th Cir. 2000); *United States v. Lopez-Valdez*, 178 F.3d 282, 288-89 (5th Cir. 1999). These courts simply

require that the legal justification for a traffic stop be objectively grounded. *See Miller*, 146 F.3d at 279.[1]

In the present case, the legal justification for the stop was objectively grounded. The North Carolina Supreme Court determined that, despite the mistake of law, an objectively reasonable officer would or could have stopped petitioner's vehicle for an apparent violation.

To the extent that there remains a conflict, this Court has not previously found this conflict to be sufficiently compelling to merit review. This Court has declined to review the Eighth Circuit's holdings in *United States v. Smart*, 393 F.3d 767 (8th Cir.), *cert. denied*, 545 U.S. 1121 (2005), and more recently in *United States v. Hastings*, 685 F.3d 724 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 958 (2013). *See also United States v. Southerland*, 486 F.3d 1355, 1358-59 (D.C. Cir.) (declining to review the holding that "the

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[1] Contrary to petitioner's representation, the *Miller* Court did not consider the mistaken interpretation of law one that any objectively reasonable officer would make when interpreting the statute; the Court simply noted that the prosecution argued a "reasonable person" would think the conduct *should* violate the law because the public would otherwise be endangered if such a law did not exist. *Miller*, 146 F.3d at 279. That is markedly different from the circumstances of this case.

question to be answered is whether it was objectively reasonable for the officers who observed his vehicle to conclude that a traffic violation had occurred"), *cert. denied*, 552 U.S. 965 (2007)

Petitioner has failed to show any substantial conflict warranting this Court's review.

II. The Question Presented Is Not Critically Important To The Sound Administration Of Criminal Justice.

Petition contends the question presented is critically important to the sound administration of justice. However, each of petitioner's rationales or justifications for this proposition are unsupported.

A. Petitioner Has Failed To Show This Is Anything Other Than A Rare Case.

Although petitioner asserts that there were 11.7 million traffic stops in the last decade in North Carolina, he has not shown how many of those stops concern mistakes at all, let alone alleged mistakes of law. Even more rare is a case in which a mistake of law – here, a mistaken interpretation of an existing statute – has been deemed objectively reasonable by a reviewing court. Indeed, given those 11.7 million stops, it appears the appellate courts of North Carolina have found such a mistake to be reasonable only once

in that time. Assuming a similar level of rarity across the country, petitioner's citation to the number of traffic stops hardly supports review.

B. The "Good Faith Exception" Is Inapplicable Only As To Some State Constitutions.

Contrary to petitioner's contentions, the answer to the question presented would have no bearing on "the admissibility of evidence seized in as many as sixteen states" (Pet. 13) because the only issue before this Court concerns the Constitution of the United States. Inasmuch as the good faith exception applies to the Fourth Amendment – and is inapplicable only in these states only under their state constitutions – this Court's review of the question is not warranted.

Petitioner appears to acknowledge[2] that under this Court's previous decisions concerning the Fourth Amendment, this same "good faith" mistake would not

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[2] Because petitioner believes this issue is outcome determinative and accepts the mistake of law as "understandable" (Pet. 16, 21), it appears he has conceded that regardless of whether a violation occurred, ordinarily the evidence would not be suppressed under the Fourth Amendment. If he has not conceded that the officer acted in objective "good faith," then the distinction he offers as "outcome determinative" cannot be correct.

warrant suppression if the good faith exception applies. *See also Davis v. United States*, 180 L. Ed. 2d 285, 293-95 (2011). He notes, however, that fourteen states have rejected, to some degree, this Court's application of the good faith exception. He further notes the reliance of the dissent at the North Carolina Supreme Court on the lack of the good faith exception in North Carolina. *See Heien*, 737 S.E.2d at 361 (Hudson, J., dissenting). What he ignores, however, is that North Carolina and other states can only prohibit application of this exception under their state constitutions. *See State v. Carter*, 370 S.E.2d 553, 554 (N.C. 1988) (holding there is no good faith exception as applied to violations of the North Carolina constitution).

This Court is not concerned with what states choose to do under their constitutions; states always remain free to broaden the rights guaranteed to their citizens beyond what the United States Constitution demands. *See Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (recognizing that a state may give its citizens broader protection than the Federal Constitution by judicial interpretation of its own constitution). Whether they have done so, however, should have no bearing on this Court's decision to grant review.

While it is true that the same fourteen state courts may continue to find that reasonable errors by the

police, other public employees, or by court officials, do not warrant the application of the good faith exception, this is not a basis for review. Those same fourteen state courts could also hold that those rare mistakes of law that might be objectively reasonable, as here, would nevertheless violate the respective provisions of their individual state constitutions, even if they did not violate the Fourth Amendment. Here, the North Carolina Supreme Court could have chosen to so hold, but it did not.

As for petitioner's citation to federal courts that may have rejected this Court's good faith exception as applied to reasonable mistakes of law, that issue is not before this Court. If this issue – whether the good faith exception can nevertheless apply to an objectively reasonable, but mistaken, statutory interpretation of law – was the issue before this Court, there might be more compelling grounds for review. The issue that is before this Court, however, has no bearing on whether the evidence is to be suppressed under federal law.

Any "odd consistency" that might arise because a state court chooses to broaden the scope of its own constitution beyond that required by the federal constitution also is not an inconsistency for this Court's consideration. This argument does not support review by this Court.

III. This Is Not An Appropriate Vehicle To Resolve The Issue.

This is not an appropriate vehicle to resolve or develop this issue further.

A. The Trial Court Did Not Rule Upon This Issue Or Resolve Facts Necessary To Its Determination.

Petitioner offers that "the State has never suggested that petitioner violated any other traffic law, [and] this mistake of law was the only possible basis for the stop." (Pet. 15) However, petitioner failed to raise this issue before the trial court either in his motion to suppress or by any argument advanced below at the pretrial hearing. Rather, petitioner appeared to concede the validity of the initial stop at the hearing.[3] (Tr. 47-53)

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[3] Petitioner's sole claim in the trial court regarding the brake light was whether it was factually operable at the time of the stop. He abandoned this claim at the hearing and conceded that any malfunction of the brake light prior to the activation of the blue lights would satisfy the stop; his only legal challenge to the stop was that it was improperly extended without his consent. (Tr. 48-50) He never argued that the officer was mistaken about the law or its interpretation or application to petitioner.

While evidence was presented that the officer activated his blue lights after observing petitioner "approach a slower moving vehicle, apply its brakes, and the right side brake light was out" (Tr. 6) and that the officer told the driver he "pulled him over for the brake light" (Tr. 9), the record is silent as to whether this was the sole basis for the stop because petitioner never challenged the legal basis for the stop. And, in fact, the officer here did not offer why, or even that, he believed petitioner had violated a specific statutory provision for that same reason.

The record also is silent as to: (1) whether there was any additional objective basis for the stop – that petitioner was following too closely, or exceeding the speed limit, *see* N.C. Gen. Stat. §§ 20-141, -152 – regardless of the officer's subjective reasons for the stop; (2) whether the officer stopped petitioner simply to inform him his brake light was out as a safety concern; or (3) whether and to what degree the officer in this case even understood, interpreted, or weighed the three existing statutes examined by the North Carolina Court of Appeals and the North Carolina Supreme Court.

Although the trial court made some findings that pertain to this issue, *see Heien*, 737 S.E.2d at 353, petitioner's failure to raise this issue to the trial court in the first instance has left the record incomplete as to a number of other facts that may be relevant to

discuss the objective basis for the stop, or whether the totality of the circumstances supported reasonable suspicion.

Because of the deficiencies in the record and lack of specific findings, this case is not an appropriate vehicle to resolve the issue before the Court.

B. The Question Presented Is Not "Outcome Determinative."

Even though North Carolina does not apply a good faith exception to its constitution, the North Carolina Supreme Court addressed only whether there was a Fourth Amendment violation. While the court did not reach the issue of whether the good faith exception applied because it found no violation, that issue would remain if this Court were to disagree.

IV. The North Carolina Supreme Court Did Not Err In Its Holding Or Analysis.

Petitioner believes that no matter how objectively reasonable, a mistaken interpretation of a state statute can never serve as part of the totality of the circumstances justifying reasonable suspicion. In other words, any error in hindsight renders the stop per se unreasonable, and the Fourth Amendment is thus violated.

"An automobile stop is subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Whren v. United States*, 517 U.S. 806, 810 (1996). Even a mistaken premise – a mistake of fact – can furnish grounds for a stop, if the officers do not know that it is mistaken and are objectively reasonable in acting upon it. *See Illinois v. Rodriguez*, 497 U.S. 177, 184-86 (1990). Under *Terry v. Ohio*, 392 U.S. 1 (1968), all that is required is that an officer have a "reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring." *United States v. Castillo*, 76 F.3d 1114, 1117 (10th Cir. 1996).

Reasonable suspicion is based on "commonsense, nontechnical conceptions" that are to be construed by "reasonable and prudent men, not legal technicians." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). In applying this standard, this Court has consistently adopted common-sense readings and rejected hyper-technical and highly scrutinizing approaches. *Id.* at 696. This Court also has "consistently eschewed bright-line rules" like petitioner's desired per se rule, "instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

And while "reasonable suspicion" demands more than "an inchoate and unparticularized suspicion or hunch," *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)

(quotation marks omitted), "some minimal level of objective justification" is all that is required, *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quotation marks omitted). Taken together, this Court's jurisprudence stands for the proposition that an officer need not be correct in his belief that a traffic law has been violated but, instead, need only establish that his belief was objectively reasonable at the time.

As one court has noted, a per se rule

> under which the stop is invalid and the evidence suppressed if a judge later disagrees with the officer's interpretation of the law – injects too much hindsight into the process. There is no good reason to require a traffic officer to have guessed correctly in advance whether a judge will later find the officer's interpretation to have been correct, at least when we are trying to regulate what is done with evidence discovered as a result of the stop, rather than the primary conduct of the purported offender. It is enough to require the officer's interpretation to have been objectively reasonable.

United States v. Washabaugh, 2008 U.S. Dist. LEXIS 4334, *4-5 (S.D. Ohio 2008).

In contrast to the per se rule, the North Carolina Supreme Court's general approach to mistakes applies the reasonableness doctrine throughout the analysis to sort through the facts and circumstances of the case to determine if a stop tainted with mistaken impressions of the law by the police officer could nevertheless be objectively reasonable. The North Carolina Supreme Court stated:

> To require our law enforcement officers to accurately forecast how a reviewing court will interpret the substantive law at issue would transform this "commonsense, nontechnical conception" into something that requires much more than "some minimal level of objective justification." We would no longer merely require that our officers be reasonable, we would mandate that they be omniscient.

Heien, 737 S.E.2d at 357-58.

A. This Is Not Simply A Matter Of The Officer's Subjective Belief.

The mistake of law here is not simply a subjective[4] one. Rather, the North Carolina Supreme Court considered it a mistake of law which was objectively reasonable – i.e., under the totality of the circumstances, an objectively reasonable officer would have considered that same conduct under state statutes as an equipment violation. No one, and certainly not the North Carolina Supreme Court, has suggested the stop was valid because this individual officer alone subjectively believed petitioner's driving with one brake light violated the law. As petitioner recognizes, "'as long as the circumstances, viewed objectively, justify [the police officer's] action,' the officer's subjective state of mind is irrelevant." (Pet. 17 (citing *Whren*, 517 U.S. at 813)). That is precisely what the North Carolina Supreme Court held.

Petitioner also argues that reasonable suspicion is met *only* when "the facts observed by the officer establish a sufficient likelihood that a law was broken." (Pet. 17) On the contrary, reasonable

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[4] Again, there is no record evidence of the subjective knowledge or reasoning of the officer in this case, or even if he was aware of each of the three state statutes reviewed by the appellate courts, as petitioner did not challenge the stop under this legal basis in the trial court below.

suspicion does not equate to "sufficient likelihood." While certain evidence that a law has been broken would assuredly provide reasonable suspicion, an officer never needs to establish that a law was in fact, or was even likely broken, before conducting a *Terry* stop. *See also Michigan v. DeFillippo*, 443 U.S. 31, 37-40 (1979).

There is no doubt that a subjective mistake of law that is not also objectively reasonable would not satisfy reasonable suspicion. But that is not what this case concerns.

B. Petitioner Is Not Being Punished For The Officer's "Ignorance Of The Law."

Petitioner contends that "ignorance of the law is no excuse." (Pet. 18) This Court's language in *Bryan v. United States*, 524 U.S. 184, 196 (1998), has nothing to do with the law on reasonable suspicion.

While it may be true that ignorance of the law does not insulate a citizen from conviction under that law, this case does not concern petitioner's conviction for the law the officer reasonably believed was being broken. To be sure, petitioner cannot now be convicted of a rear brake light violation under the general statutes of North Carolina. As with any *Terry* stop, the analysis does not rest upon whether a conviction must follow. *Sokolow*, 490 U.S. at 7 (holding

reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence").

There are obviously mistaken interpretations – or types of "ignorance" – of the law that could not support reasonable suspicion. In those cases in which no statute existed at all, the mistaken belief of the police officer that the conduct violated the law would not be objectively reasonable under the North Carolina holding. *See United States v. Washington*, 455 F.3d 824, 827-28 (8th Cir. 2006) (holding an officer's mistake of law was not objectively reasonable where there were no counterintuitive and confusing statutes that might support the officer's belief that a law had been broken). Where the conduct of a defendant did not violate the plain and easily understood language of a statute, a mistake of law also would not be objectively reasonable. And where there was already case law on an issue, decisively addressing the matter at issue, a mistake of law would hardly be excusable.. Yet, these are not the circumstances of the case before this Court.

C. The Reasonable Suspicion Standard Is Not Confined To Incorrect Factual Suppositions.

There is nothing in the reasonable suspicion standard that confines itself to incorrect factual

suppositions. And there is nothing in the holdings of *Rodriguez* or *Terry* that supports this proposition. To the contrary, in *Terry*, there could be no certainty that any of the defendants were committing a crime, let alone that their conduct unquestionably violated a specific statute. *See Terry*, 392 U.S. at 22 (noting that the officer only observed each of the defendants "go through a series of acts, each of them perhaps innocent in itself"). And, again, an officer never needs to establish that a specific law or statute was in fact, or was even likely broken, before conducting a *Terry* stop, as petitioner demands here.

D. The Ruling Does Not Place Officers in the Role of Legislatures and Courts.

Petitioner argues the ruling in this case would permit the consideration of policy manuals and customs and allow officers to usurp the role of legislatures and courts. Were a mistake to be supported only by the consideration of "local manuals [or] customs," (Pet. 23), it may very well not be objectively reasonable. But those are not the circumstances of the case before this Court.

The reasonable suspicion analysis is always applied on a case-by-case basis. The mere fact that a reviewing court must consider each of the circumstances that make up the totality and that a number of different circumstances might come into

play in a variety of cases has little do with whether review is appropriate or, in this case, whether the North Carolina Supreme Court erred.

* * *

Petitioner has failed to show there is a significant conflict as to the issue before this Court and has failed to show this case is an appropriate vehicle to resolve the issue. Certiorari review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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March 2014

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REPLY BRIEF

No. 13-604

IN THE

Supreme Court of the United States

NICOLAS BRADY HEIEN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari
to the North Carolina Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Having persuaded a bare majority of its state supreme court to take the minority position on a Fourth Amendment issue of obvious consequence, the State offers a hodgepodge of arguments to try to evade this Court's review. None has any force. The conflict over whether a so-called reasonable mistake of law can justify a traffic stop is widespread and mature. And this case presents the perfect opportunity to resolve it.

1. Neither of the State's attempts to undermine the vitality of the conflict withstands scrutiny.

a. The State acknowledges that the North Carolina Supreme Court's holding conflicts with holdings from the First, Tenth, and Eleventh Circuits. BIO 4-5. The State also does not dispute that the holding conflicts with the Ninth Circuit's decision in *United States v. King*, 244 F.3d 736, 741 (9th Cir. 2001), as well as with holdings from the Florida, Iowa, Kansas, Minnesota, and Montana Supreme Courts. *See* Pet. 8-9. Finally, the State agrees that the North Carolina Supreme Court's holding aligns with holdings from several other jurisdictions. BIO 4. Those explicit and implicit acknowledgements are more than enough to confirm the existence of a deep division of authority warranting this Court's review.

The State nevertheless quibbles over whether the Seventh Circuit's decision in *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006), and the Fifth Circuit's decision in *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998), also conflict with the decision below. *See* BIO 5-6. These quibbles lack merit. In *McDonald*, the Seventh Circuit squarely

held that "even a reasonable mistake of law cannot support probable cause or reasonable suspicion" and that "[i]t makes no difference that an officer holds an understandable or 'good faith' belief that a law has been broken." 453 F.3d at 961-62. In *Miller*, the Fifth Circuit likewise held that even when a "reasonable person" at the time of a traffic stop would construe state law to prohibit the conduct that the officer observed, the traffic stop violates the Fourth Amendment if that construction of state law turns out to be incorrect. 146 F.3d at 279.

b. The State also suggests that "this Court has not previously found this conflict to be sufficiently compelling to merit review." BIO 6. But none of the three cases the State cites cleanly presented the question presented here.

In *United States v. Smart*, 393 F.3d 767 (8th Cir.), *cert. denied*, 545 U.S. 1211 (2005), in contrast to this case, *see* Pet. App. 7a, 34a; BIO 18, the police officer did not make any mistake of law. Instead, the officer simply discovered, after stopping the defendant's car for failing to display an in-state license plate in a proper manner, that the car's license plate was from a different state than the officer thought it might have been when he initiated the stop. *Smart*, 393 F.3d at 769-70.

In *United States v. Hastings*, 685 F.3d 724 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 958 (2013), there was likewise no holding below that the police officer misinterpreted the unsafe-driving law at issue. To the contrary, the government maintained that the officer correctly understood and applied state law, *see* Br. for Appellee 15-17, 2011 WL 6167477, and the

Eighth Circuit did not disagree with that contention, *see* 685 F.3d at 727-28.

Lastly, in *United States v. Southerland*, 486 F.3d 1355 (D.C. Cir.), *cert. denied*, 552 U.S. 965 (2007), the petition for certiorari did not even challenge the legality of the traffic stop. *See* Pet. for Cert. i, *Southerland v. United States*, No. 07-6262 (focusing only on subsequent arrest). And for good reason: The D.C. Circuit assumed that the officers "were mistaken that [state] law required display of the front plate on the bumper." *Southerland*, 486 F.3d at 1359. But the stop was still valid because – in contrast to this case – the facts the officers observed seemingly violated state law as properly construed. In particular, state law required front license plates to be "securely fastened" and "clearly visible," and the defendant's license plate was merely sitting on his dashboard. *Id.* at 1358-59; *see also* Pet. 15-16 (distinguishing similar cases from the facts here).

Accordingly, this case appears to the first one squarely presenting the question of whether a so-called reasonable mistake of law can provide reasonable suspicion to effectuate a traffic stop.

2. When the State sought review of this case in the North Carolina Supreme Court, it explained that the case raised an issue "of major significance." State's Pet. for Disc. Rev. 3.[1] The State now contends, for two reasons, that the question presented "is not critically important." BIO 7. The State was right the first time.

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[1] This brief is available at http://www.ncappellatecourts.org/show-file.php?document_id=84542.

a. Contrary to the State's suggestion (BIO 7-8), the question whether a so-called reasonable mistake of law can provide reasonable suspicion to effectuate a traffic stop is not one that arises only "rarely." In recent years, no fewer than six federal courts of appeals and nine state courts of last resort have found it necessary to decide the issue. Pet. 8-11. Given the pervasiveness of traffic stops and the degree of winnowing that occurs between such stops and appeals, common sense dictates that these appellate decisions represent only the tip of the iceberg.

b. The question presented has great import for jurisdictions across the country.

i. The State argues that the question presented may not matter in the fourteen to sixteen states that have rejected the "good faith" exception to the exclusionary rule. Specifically, the State suggests that even if this Court were to hold that traffic stops based on reasonable mistakes of law comport with the Fourth Amendment, courts in those states might hold that such stops "nevertheless violate the respective provisions of their individual state constitutions." BIO 10. But the issue whether evidence obtained from illegal seizures is subject to exclusion is distinct from whether a traffic stop constitutes an illegal seizure in the first place. Pet. 19. And the State itself acknowledges that the North Carolina Supreme Court rested its illegal-seizure analysis here directly and exclusively on the Fourth Amendment. BIO 10. So has every other state court to decide the issue. Pet. 9-11 (citing cases). Accordingly, there is no reason to think that any state's lack of a "good faith" exception to the

exclusionary rule would cause it to decide – in the teeth of a Fourth Amendment holding from this Court to the contrary – that stops based on reasonable mistakes of law violate state constitutions.

As a more general matter, states are *always* free to afford their citizens heightened protection against unreasonable searches or seizures. Yet this reality has never been thought to provide this Court with reason to refrain from resolving conflict over the Fourth Amendment. To the contrary, this Court has stressed that even when there are grounds to believe that state courts would construe state counterparts to the Fourth Amendment to provide heightened protection against searches or seizures, there still is "an important need for uniformity in federal law" that warrants expenditure of this Court's resources. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). The State offers no reason to diverge here from this settled rule of practice.

ii. With respect to jurisdictions that recognize the good faith exception, the State argues that resolving the question presented would not matter because even if traffic stops based on reasonable mistakes of law violate the Fourth Amendment, "ordinarily the evidence would not be suppressed under the Fourth Amendment." BIO 8 n.2. But the only case the State cites to support that assertion is *Davis v. United States*, 131 S. Ct. 2419 (2011). And, as the Petition already noted, all three federal courts of appeals to consider the question have distinguished the situation in *Davis*, which involves police reliance on a clear statement from the judiciary, from the situation here, which involves a mistake of law concerning an

issue the judiciary has not previously addressed. *See* Pet. 14 & n.6 (citing cases). The State offers no response to these decisions or any explanation why this Court would extend the good faith exception into such territory. There is consequently strong reason to believe that if this Court were to hold stops such as the one at issue here unconstitutional, that holding would impact criminal prosecutions in every jurisdiction in the country.

It also is important to bear in mind that the question presented – like any Fourth Amendment issue – also matters well beyond the confines of criminal prosecutions. At its core, the Fourth Amendment regulates police officers' primary behavior. If the Fourth Amendment permits officers to make traffic stops based on misconceptions about state law, for example, then it "would reduce the incentives for police forces to be well trained in the law" and "cause an exponential increase in [traffic] stops." NACDL Amicus Br. 15. Indeed, if the State's conception of the Fourth Amendment is correct, local police departments across the country could adopt policies directly instructing their officers to stop motorists based on any and all "reasonable" interpretations of local traffic law, regardless of whether such interpretations are correct. By contrast, if the State's view of the Fourth Amendment is mistaken, such policies would violate the Constitution. (They also would expose police departments to lawsuits for damages under 42 U.S.C. § 1983. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658, 690-95 (1978).) Neither policymakers nor motorists should be left in the dark in this respect.

3. The State next asserts that "[t]his is not an appropriate vehicle to resolve the issue." BIO 11. But each of the arguments the State advances to support this assertion are unpersuasive.

a. When the State sought review of this case in the North Carolina Supreme Court, it explained "[t]he *sole fact* necessary to this petition is that [the] right brake light of the vehicle in which defendant was traveling was malfunctioning or inoperable." Pet. for Disc. Rev. 2 (emphasis added). The State now contends, however, that "petitioner's failure to raise this issue to the trial court in the first instance has left the record incomplete as to a number of other facts that may be relevant" to the legality of the stop. BIO 12. The State's new position is doubly wrong.

As an initial matter, petitioner *did* argue in the trial court that the traffic stop "was an illegal seizure in violation of the Fourth Amendment" because North Carolina statutes "require a vehicle neither to have all brake lights in good working order nor to be equipped with more than one brake light." Pet. App. 3a; *see also* Tr. 13. The State thus had every incentive to develop all evidence allegedly justifying the stop. After a hearing, the trial court held that the traffic stop was constitutional for the sole reason that "Sergeant Darisse had a 'reasonable and articulable suspicion that the subject vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light.'" Pet. App. 5a (quoting trial court ruling). The North Carolina Supreme Court likewise condoned the stop exclusively on this basis. Pet. App. 8a-20a. Hence, the record and available legal theories have been fully developed.

At any rate, the State's musings concerning other grounds that might support the traffic stop are baseless. The State first suggests that perhaps petitioner's car could have been following another vehicle too closely or was "exceeding the speed limit." BIO 12. But there is zero reason to suspect the former and Officer Darisse expressly testified that the car "wasn't speeding." Tr. 19. The State next suggests that maybe "the officer stopped petitioner simply to inform him his brake light was out as a safety concern." BIO 12. But Officer Darisse explicitly testified that he deemed the faulty light to be "improper" and wrote out a "warning ticket" for the perceived traffic violation. Tr. 14; *accord* Pet. App. 2a. Lastly, the State suggests uncertainty concerning whether the officer here "even understood, interpreted, or weighed" the state statutes concerning brake lights. BIO 12. But Officer Darisse obviously contemplated those laws enough to stop petitioner's car "for a nonfunctioning brake light" and to issue a "warning ticket" for that supposed violation of state traffic law. Pet. App. 2a.

Taking all of this into account, the North Carolina Supreme Court explained that this case turns on "whether a stop is . permissible when an officer witnesses what he reasonably, though mistakenly, believes to be a traffic violation" *and "the conduct fails simultaneously to indicate another law is being violated."* Pet. App. 9a (emphasis added). That is exactly as petitioner describes the issue. The State's attempt to cloud the situation is groundless.

b. The State also briefly suggests that the question presented may not be outcome-determinative because it could argue on remand that

the good faith exception to the exclusionary rule should apply here. BIO 13. But the State "abandoned" any such argument by failing to raise it below. N.C. R. App. P. 28(a). In any event, the State itself acknowledges that the North Carolina Constitution precludes any "good faith" exception to the exclusionary rule. BIO 9, 13; *see also State v. Carter*, 370 S.E.2d 553, 562 (N.C. 1988).

4. The State's argument on the merits provides no reason to deny review in light of the entrenched conflict here. The argument is also unconvincing on its own terms.

The State primarily contends that the Fourth Amendment's "reasonableness" standard affords police officers flexibility not only with respect to factual assessments but also with respect to legal determinations. BIO 13-21. The Petition and NACDL's amicus brief already explain why that contention is erroneous. *See* Pet. 21-23; NACDL Amicus Br. 3-11. To summarize: determining the meaning of law is the province of the judiciary, not police officers – in part to avoid inconsistent outcomes under undifferentiated facts. Accordingly, the "reasonable suspicion" test requires potentially incriminating facts to be assessed "against the correct interpretation of the law, as opposed to any other interpretation, even if arguably a reasonable one." *United States v. Nicholson*, 721 F.3d 1236, 1244 (10th Cir. 2013).

Contrary to the State's suggestions, this rule does not require police officers to establish that "a specific law or statute was in fact, or was even likely broken," BIO 20; *see also id.* 17-18. Instead, the requirement that "reasonable suspicion" be measured against the

correct interpretation of the law simply clarifies that while the Fourth Amendment grants officers leeway with respect to factual assessments, it would be inconsistent with our constitutional structure to allow those entrusted with enforcing the law to restrain people's liberty based on incorrect legal assumptions. As the majority of lower courts already recognize, this is hardly too much to ask.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 18, 2014

AMICUS CURIAE BRIEF

No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST AND IDENTITY OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of ap-

[1] Consent of the parties to the filing of this brief has been filed with the Court. This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than amicus and its counsel contributed monetarily to its preparation or submission.

proximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous amicus curiae briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL frequently appears as amicus curiae in cases involving the Fourth Amendment, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests.

INTRODUCTION AND SUMMARY OF ARGUMENT

NACDL agrees with petitioner that certiorari is warranted here based on the entrenched, irreconcilable division among the federal courts of appeals and state courts of last resort on the question of whether a law enforcement officer's reasonable mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify an investigatory stop. *See* Pet. 7-12. This important issue warrants this Court's review because it is critical to the administration of justice. Clarification from the Supreme Court on whether mistakes of law can justify investigatory stops, and any resulting criminal or administrative proceedings, is necessary to provide guidance to law enforcement officers, courts, prosecutors, defense attorneys, legislative bodies, and the public at large. *See* Pet. 12-15.

NACDL also agrees with petitioner that review is warranted because the North Carolina Supreme Court's decision is erroneous. The Fourth Amendment prohibits traffic stops when an officer accurately perceives a driver's conduct but incorrectly believes that the conduct violates the law. *See* Pet. 16-25.

NACDL files this brief to make two important points: *First*, the North Carolina Supreme Court's rule is flatly inconsistent with the principles underlying this Court's Fourth Amendment jurisprudence. It has always been the province of the courts, not law enforcement, to determine and apply the law governing an investigatory stop. There is no basis under the Fourth Amendment for officers to conduct seizures based on nothing more than suspicion of conduct that violates no law. *Second*, the North Carolina Supreme Court's rule, if left undisturbed, will have substantial negative effects, including condoning a broad swath of searches unrelated to suspicion of any violation of any actual law, and reducing or removing important incentives for police officers to understand thoroughly the laws they are charged with enforcing.

ARGUMENT

I. THE NORTH CAROLINA SUPREME COURT'S RULE IS CONTRARY TO THE PRINCIPLES UNDERLYING THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment protects a person's right to be secure in her person, and against unreasonable intrusion by the government. "[A]s this Court has always recognized, '[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable au-

thority of law.'" *Terry* v. *Ohio*, 392 U.S. 1, 9 (1967) (quoting *Union Pac. Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891)). Moreover, "[t]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Id.* at 8-9.

In the context of investigatory stops, whether of vehicles or persons, the State may intrude on an individual's personal security and privacy, but only based on reasonable suspicion of *illegal* activity. The starting, and most basic, requirement for an investigatory stop, which runs throughout this Court's cases, is that there be a reasonable suspicion "that *criminal activity* may be afoot[.]" *Terry*, 392 U.S. at 30 (emphasis added); *see also Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) ("[Reasonable suspicion requires] 'a particularized and objective basis' for suspecting the person stopped of *criminal activity*[.]") (emphasis added) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981)). This Court has stated the same principle in the context of traffic stops: "[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist [has violated the law], stopping an automobile and detaining the driver . . . are unreasonable under the Fourth Amendment." *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979).

The rule that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in *criminal activity*" is an important limitation. *Cortez*, 449 U.S. at 417 (emphasis added). The State may not intrude on a person's security and privacy merely because an officer suspects activity that is wholly innocent. To be sure, an officer's *observance* of purely innocent activity can give rise to *reasonable suspicion* of criminal activity. This is

the case where, based on an officer's training and experience, "a series of acts, each of them perhaps innocent in itself, . . . taken together warrant[] further investigation." *Terry*, 392 U.S. at 22. But where innocent conduct gives rise only to a suspicion of further innocent activity, the Fourth Amendment forbids an investigatory stop and its accompanying severe intrusion on the privacy and security of an individual's person. *See, e.g.*, *Prouse*, 440 U.S. at 661-663 (holding an investigatory traffic stop, unlike a roadblock, requires individualized reasonable suspicion that the motorist is violating a law). An intrusion in these circumstances is simply unacceptable under the Fourth Amendment.

Yet this is what the North Carolina Supreme Court's rule (and the rule in other decisions on the same side of the split) condone. The rule allows stops, and the accompanying intrusion on individual security and privacy, where—as an objective matter—an officer's suspicion is only of activity that is entirely innocent. The rule thus expands the scope of permissible government intrusion beyond investigation of suspected criminal conduct and to some unidentified penumbra around such criminal statutes—conduct mistakenly believed to be covered, but not actually prohibited, by a statute. Individuals who seek to be spared the intrusion, anxiety, and inconvenience of an investigatory stop not only must avoid conduct that is actually prohibited by law—which laws they are presumed to know—but also must intuit and avoid the lawful conduct that officers might reasonably but wrongly believe is prohibited by statute.

Indeed, from the individual's perspective, there is no difference between the stop approved by the North Carolina Supreme Court here and, for example, the discretionary spot checks that this Court rejected in

Prouse. In both circumstances, the individual has done nothing that violated any motor vehicle law nor anything that even gives rise to suspicion of a violation of an actual law. *See Prouse*, 440 U.S. at 650 ("[T]he patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity[.]"). The scope of the *individual's* right to be free from government seizure should be the same in each instance; it should not vary based on *another person's* understanding or misunderstanding of the law.

Contrary to the North Carolina Supreme Court's approach, this Court's cases make clear that a correct application of the Fourth Amendment requires measuring the facts perceived by the officer, plus the officer's expert and rational inferences from those facts, against an *objective* legal standard. For example, in *Whren* v. *United States*, 517 U.S. 806, 813-815 (1996), this Court held in plain, explicit terms that the constitutional reasonableness of a traffic stop does not depend on the actual motivations of the officers. *See id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").[2] Nor does the constitutional analysis depend on a seemingly objective standard tied to the particular circumstances of the officer who conducts a stop, something this Court characterized in *Whren* as a "virtual subjectivity" analysis. *See id.* at 815 ("[O]rdinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called *vir-*

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[2] While the NACDL submitted an amicus brief in *Whren* opposing the result that the Court reached, the principles set forth in the Court's decision necessarily reject the North Carolina Supreme Court's rule here.

tual subjectivity." (emphasis added)). Rather, the governing principle in this Court's cases, the *Whren* Court observed, is "that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. Reasonableness is measured against an objective standard. That should be the case whether the question is whether the Fourth Amendment allows, *or disallows*, police activity.

Furthermore, this Court's cases make clear that the objective standard against which an officer's observed facts are measured is the *actual* criminal law, not the officer's perception of the law. In *Ornelas*, this Court explained the methodology for Fourth Amendment inquiries:

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. . "[T]he historical facts are admitted or established, *the rule of law is undisputed*, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether *the rule of law* as applied to the established facts is or is not violated."

517 U.S. at 696-697 (emphasis added) (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982)).

Contrary to this methodology, under the North Carolina Supreme Court's approach, courts must measure the facts as observed by the officer, together with

expert inferences from those facts, against not only the actual criminal law but also against any other reasonable interpretation of law by the officer that, while incorrect, might justify the stop. *See, e.g.*, *United States* v. *Nicholson*, 721 F.3d 1236, 1244 & n.8 (10th Cir. 2013). That approach is erroneous because, as this Court's cases make clear, the objective legal standard to be applied is the actual criminal law—not a prohibition of some penumbra of broader conduct mistakenly believed to be covered, but not actually prohibited, by a statute. An officer's mistake about the content of the actual law—whether the mistake is reasonable or unreasonable—is irrelevant.

As the Court explained in *Ornelas*, there is a good reason why Fourth Amendment analysis proceeds in this manner. On undifferentiated facts, the result under the Fourth Amendment should be the same from case to case. *See Ornelas*, 517 U.S. at 697 ("Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable."). The Court made the same point in *Whren* when it rejected an approach under which courts would need to evaluate "police enforcement practices" when determining reasonableness. Because law enforcement practices "vary from place to place and from time to time . [w]e cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Whren*, 517 U.S. at 815 (internal citations omitted). The approach adopted by the North Carolina Supreme Court and other courts on its side of the split not only lays the foundation for disparate outcomes across location and time on the same set of facts, it also contravenes *Whren* by implicitly calling for the examination of local law enforcement practices to determine

whether an officer's interpretation of the law was reasonable. *E.g.*, *United States* v. *Washington*, 455 F.3d 824, 828 (8th Cir. 2006) (noting that "evidence of police manuals or training materials, state case law, legislative history, or any other state custom or practice" bear on the question of whether an officer's misreading of a statute was reasonable).

For all of these reasons, under established Fourth Amendment principles, an officer's mistake of law cannot provide the individualized suspicion necessary for an investigatory stop. It matters not that the permissibility of a Fourth Amendment search or seizure is premised on *the facts* as observed by the officer. *E.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 184 (1990) (holding officers' reasonable mistake of fact regarding consent does not invalidate a warrantless entry). As the Court correctly recognized in *Rodriguez*, officers are expected to exercise expert judgment as to inferences to be gleaned from observed facts. *Id.* Moreover, because an officer cannot anticipate in advance the facts she will encounter in the course of her duties, but must often make swift decisions based on ambiguous circumstances, "'room must be allowed for some mistakes'" of fact by officers. *Id.* at 186 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949)).

None of these observations is true when it comes to the scope of the governing law. Determining the meaning of that law is the province of the judiciary, not police officers. This Court's decisions have never held to the contrary. Were that not the case, then the right of someone in petitioner's shoes in this case to be free of unreasonable seizures would depend on just the type of "virtual subjectivity" analysis that this Court rejected in *Whren*, 517 U.S. at 814-816, and impermissibly lead to different interpretations of the scope of Fourth

Amendment rights in different cases, *id.* at 815. *See also Ornelas*, 517 U.S. at 697-98 ("[P]roviding law enforcement officers with a defined set of rules . . . in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." (internal quotation marks omitted)).

The impropriety of injecting an officer's reasonable beliefs about the law into a Fourth Amendment analysis can be seen most clearly when one considers the law-declaring function of a court when it comes to determining whether police conduct constitutes a search or seizure. When making such determinations, it has never been relevant to this Court whether the officer on the street reasonably believes, for example, that the investigatory conduct was not a search under applicable law. Take the use of GPS before the time this Court decided *United States* v. *Jones*, 132 S. Ct. 945 (2012). At that earlier point in time, courts were split on whether law enforcement's attaching of an electronic-tracking GPS device to a vehicle, and then use of that device to monitor the vehicle's movements, constituted a search under the Fourth Amendment. As a result, an officer in a jurisdiction yet to have addressed that issue might reasonably have argued that she, in turn, reasonably believed that use of GPS was not a search. That would not, and could not, be relevant, though, to whether the Fourth Amendment was or was not violated. If such interpretations of the law by officers are irrelevant to whether conduct is a search or seizure in the first instance, they also must be irrelevant to a court's determination of the law against which reasonable suspicion is measured for purposes of analyzing an investigatory stop.

The rule adopted by the North Carolina Supreme Court not only conflicts with precedent of this Court, it is fundamentally unfair to defendants in a directly relevant way. Under the North Carolina rule, the State may rely on officers' mistakes of law in investigating and amassing evidence for prosecution of a crime. However, at the same time, defendants generally may *not* rely on *their* ignorance or mistakes of law as a defense to criminal liability. *See Cheek* v. *United States*, 498 U.S. 192, 199 (1991) (collecting cases) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."). The reason for this "deeply rooted" rule is the accepted notion that, because the law is "definite and knowable," every person knows the law. *Id.* (collecting additional cases). There is no reason why any different notion should be applied to law enforcement officers conducting investigatory stops. Even more than the general citizenry, police officers have a professional duty to know and comprehend the laws they enforce. They should accordingly, at minimum, be held to the same standard as laypersons. *See, e.g., Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("[D]ecency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.").

II. THE NORTH CAROLINA SUPREME COURT'S RULE WILL CONDONE A BROAD SWATH OF INVESTIGATORY STOPS THAT OTHERWISE LACK ANY LEGAL JUSTIFICATION, AND PROVIDE IMPROPER INCENTIVES TO LAW ENFORCEMENT

Under the North Carolina Supreme Court's rule, law enforcement may lawfully stop persons to investigate suspected conduct that does *not* violate any law, so

long as the officer reasonably believes the suspected conduct is prohibited. For each such seizure, if the police officer knew the correct bounds of the criminal law at the time of the investigatory stop, the officer could not lawfully stop the individual. There would be no valid law enforcement reason for the stop. The only justification for the stop under the North Carolina rule is, accordingly, a misunderstanding of the law.

While the North Carolina Supreme Court portrayed its holding as a limited one, affecting only those instances where officers cannot forecast a novel interpretation of the law, it will have a much broader effect. The occasions for misunderstanding of the law extend far beyond the circumstances in this case. If not reversed, the North Carolina Supreme Court's holding will have a significant effect, reducing important incentives for police departments to train officers to know and understand well the law they enforce and equally critical incentives for individual officers to know the law and exercise restraint when they do not.

First, the scope of the North Carolina Supreme Court's rule is much broader than that court acknowledges. While the mistake in this case involved a question of first impression regarding the motor vehicle code, the holding is not so limited. Rather, the decision holds that an investigatory stop unrelated to any violation of any actual government prohibition may be justified solely by an error of law, so long as the error is reasonable. The holding would accordingly condone searches in a broad swath of circumstances in which an officer may misunderstand the law he suspects to have been violated. As the dissenting justices of the North Carolina Supreme Court recognized, the rule "will also apply . . . when the officer acts based on a misreading of a less innocuous statute, or an incorrect memo or train-

ing program from the police department, or his or her previous law enforcement experience in a different state, or his or her belief in a nonexistent law." Pet. App. 22a; *see also id.* 27a (noting rule's application when mistakes "arise from simple misreadings of statutes, improper trainings, or ignorance of recent legislative changes"). The North Carolina Supreme Court's rule not only sets the stage for stops in these circumstances, it also increases the likelihood of their occurrence.

Take, for example, officers' "simple misreadings" of statutes. Pet. App. 27a. There may be many statutes that courts would have little trouble interpreting but that an officer on the street—lacking the same legal training as judges and lawyers—might reasonably read differently. There is no valid law enforcement reason for stopping an individual to investigate conduct that violates only the misunderstood version of the law. Yet, under the North Carolina Supreme Court's rule, investigatory stops based on "simple misreadings" are permissible. *E.g.*, Pet. App. 18a-19a; *United States* v. *Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (holding though law was clear under a "close textual analysis . we think the level of clarity falls short of that required to declare Officer Grube's belief and actions objectively unreasonable under the circumstances"). If this Court accepts that reasonable mistakes of law can justify investigatory stops, the number of cases based solely on an officer's "simple misreading" would likely be significant. *E.g.*, *United States* v. *Nicholson*, 721 F.3d 1236, 1239-1241 (10th Cir. 2013); *United States* v. *King*, 244 F.3d 736, 739-742 (9th Cir. 2001); *Hilton* v. *State*, 961 So. 2d 284, 287-293 (Fla. 2007); *State* v. *Anderson*, 683 N.W.2d 818, 821-822 (Minn. 2004); *State* v. *Lacasella*, 60 P.3d 975, 978-979 (Mont. 2002).

Moreover, every year the nation's courts confront a number of cases involving the construction and application of criminal and other statutes, with each such case necessarily involving a disagreement among lawyers (and sometimes among judges and courts too) about the meaning and scope of the statute. *E.g.*, *People* v. *Williams*, 305 P.3d 1241, 1250 (Cal. 2013) (rejecting appellate court's and attorney general's interpretation of robbery statute); *State* v. *Webster*, 60 A.3d 259, 266 (Conn. 2013) (rejecting appellate court's and defendant's interpretation of narcotics statute); *People* v. *Jones*, __ N.E.2d __, 2013 WL 6062086, at *2-3 (N.Y. 2013) (rejecting trial court's and defendant's interpretation of firearm statute). Each such disagreement represents a potential ground for an officer to have reasonably misunderstood a law. Investigatory stops based on "simple misreadings" are thus likely to be far more prevalent than the narrow question-of-first-impression example at issue here. They are likely to increase too, once officers learn that such reasonable differences in view about the scope of a statute can provide a perfectly *legal* reason to conduct an investigatory stop.

Other instances where the North Carolina Supreme Court's rule would have similar deleterious effects, as the dissenting justices recognized, are instances where an officer misinterprets the governing law due to faulty training (*e.g.*, *United States* v. *Chanthasouxat*, 342 F.3d 1271, 1274 (11th Cir. 2003); *United States* v. *Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000)); incomplete police guidebooks (*e.g.*, *United States* v. *McDonald*, 453 F.3d 958, 959-960 (7th Cir. 2006)); an incorrect assumption about which jurisdiction's law governs (*e.g.*, *State* v. *Louwrens*, 792 N.W.2d 649, 650 (Iowa 2010)); an incorrect belief based on "common

knowledge" (*e.g.*, *Martin*, 411 F.3d at 1001); an incorrect belief about another jurisdiction's law (*e.g.*, *Travis* v. *State*, 959 S.W.2d 32, 34 (Ark. 1998)); an incorrect assumption that an earlier version of a law still governs; or simply a lack of experience in the relevant area of law. Absent the North Carolina rule, police departments will have every incentive to ensure that their training is comprehensive, correct, and up to date, while police officers will have equally important incentives to ensure that they know and understand well the laws of the particular jurisdictions in which they operate. Affirmance of the decision below would have exactly the opposite effects: it would reduce the incentives for police forces to be well trained in the law, resulting in increasing numbers of investigatory stops that lack any legal basis apart from the officer's misunderstanding of the law.

Indeed, there is good reason to fear that North Carolina's rule will cause an exponential increase in such stops. Under existing law, courts accord substantial deference to police officers conducting investigatory stops regarding the officers' factual observations and expert inferences based on those facts. *See, e.g.*, *Cortez*, 449 U.S. at 418-420. Under the North Carolina Supreme Court's rule, officers would also be accorded considerable leeway with respect to their legal judgments, but for the opposite reason—that the officer *lacks* the requisite legal expertise to understand the law at issue. When combined with existing law governing investigatory stops, then, the North Carolina rule places substantial discretion in the officer, allowing the officer in the first instance to justify every such search based on his own factual and legal judgments. And, because the scope of a permissible investigation expands in inverse relation to the officer's knowledge and ex-

pertise of the law, the North Carolina rule "would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *Lopez-Soto*, 205 F.3d at 1106.

Already, nearly 63 million Americans have one or more face-to-face contacts with the police over the course of a year. U.S. Dep't of Justice, Bureau of Justice Statistics, *Police Behavior During Traffic and Street Stops, 2011*, at 1 (2013), *available at* http://www.bjs.gov/content/pub/pdf/pbtss11.pdf. Of this group, nearly 13 million interact with the police in the context of a traffic stop. *Id.* at 2. Of those drivers whom officers elect to search, be it their person or vehicle, only 1 of 10 drivers are found to possess illegal items. U.S. Dep't of Justice, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2008*, at 10 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf. For the reasons explained above, North Carolina's rule is likely to make these statistics worse—more stops justified by nothing more than a legal misunderstanding, with fewer such stops resulting in any law enforcement benefit.

This Court frequently takes into account the real-world effects of contrasting views of disputed constitutional criminal procedure rules.[3] The same accounting

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[3] *See, e.g.*, *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1563 (2013) (exigency dependent on time between arrest and administration of blood test would "distort law enforcement incentives" by discouraging officers from expediting the warrant process); *Brendlin* v. *California*, 551 U.S. 249, 263 (2007) (if car passenger were not considered "seized" during traffic stop, it would invite police to stop cars regardless of reasonable suspicion and create "powerful incentive" for police to run "roving patrols"); *James* v. *Illinois*, 493 U.S. 307, 318 (1990) (rejecting state's proposed expansion of impeachment exception to allow impeachment of defendants with

here strongly supports a grant of certiorari to reverse the decision of the North Carolina Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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DECEMBER 18, 2013

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illegally obtained evidence, noting that "police misconduct will be encouraged" by such expansion); *United States* v. *Johnson*, 457 U.S. 537, 561 (1982) ("If . . . all rulings resolving unsettled Fourth Amendment questions should be non-retroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior.").

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUN 9 - 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On a Writ of Certiorari
to the Supreme Court of North Carolina

JOINT APPENDIX

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Petition for Certiorari filed November 13, 2013
Certiorari granted April 21, 2014

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RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
04/30/2009	North Carolina, Surry County, General Court of Justice, District Court Division. Magistrate's Order filed.
09/24/2009	North Carolina, Surry County, General Court of Justice, District Court Division. Indictment filed.
01/21/2010	North Carolina, Surry County, General Court of Justice, District Court Division. Defendant's motion to suppress filed.
03/03/2010	North Carolina, Surry County, General Court of Justice, District Court Division. Defendant's amendment to motion to suppress filed.
03/18/2010	North Carolina, Surry County, General Court of Justice, District Court Division. Suppression hearing held; motion to suppress denied.
03/25/2010	North Carolina, Surry County, General Court of Justice, District Court Division. Order denying motion to suppress issued.
05/26/2010	North Carolina, Surry County, General Court of Justice, District Court Division. Plea agreement entered; defendant sentenced; notice of appeal filed.
08/16/2011	Court of Appeals of North Carolina. Decision issued.
09/02/2011	Supreme Court of North Carolina. Petition for discretionary review filed.
01/26/2012	Supreme Court of North Carolina. Petition for discretionary review granted.

05/07/2012	Supreme Court of North Carolina. Oral argument heard.
12/14/2012	Supreme Court of North Carolina. Decision issued; reversed and remanded to Court of Appeals of North Carolina.
04/02/2013	Court of Appeals of North Carolina. Decision on remand issued.
05/03/2013	Supreme Court of North Carolina. Notice of appeal filed.
10/14/2013	Supreme Court of North Carolina. Oral argument heard.
11/08/2013	Supreme Court of North Carolina. Decision issued.

A TRUE COPY
Clerk of Superior Court
BY: */s/Sandra Hudson*
Assistant Clerk Superior Court

STATE OF NORTH CAROLINA

SURRY COUNTY

STATE OF NORTH CAROLINA

vs.

NICHOLAS HEIEN,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 09 CRS 51417

ORDER

THIS MATTER was heard before the undersigned Presiding Superior Court Judge on March 18, 2010 in Surry County Criminal Superior Court. The Court makes the following findings of fact by a greater weight of the evidence, based upon the sworn testimony rendered in open court and the admitted exhibit:

1) The defendant was present along with counsel, Mr. Hugh Mills, Surry County Bar. The State was represented by Mr. Tim Watson, Assistant District Attorney, Judicial District 17-B.
2) This matter comes on pursuant to a Motion to Suppress executed by Defendant's counsel on the 21st day of January, 2010, and amendment to the Motion to Suppress filed March 3, 2010.

3) Matt Darisse, of the Surry County Sheriff's Department, was working criminal interdiction on Interstate 77 on April 29, 2009 at approximately 8:00 a.m.

4) Darisse is a law enforcement officer with 20 years experience.

5) Darisse was sitting stationary while observing northbound traffic on I-77 when a vehicle passed him. The driver of this vehicle appeared to be stiff and nervous. The officer then pulled his vehi[illegible] onto I-77 and began following the subject vehicle. The subject vehicle slowed for a slower vehicle in its lane of travel. Darisse observed the right brake light of the vehicle not to function as the left brake light of the vehicle came on as the subject vehicle slowed. Darisse upon making this observation, activated his blue light and instigated a stop of the subject vehicle.

6) The subject vehicle's right brake light was not functioning at the time of the instigation of the stop by observation of the video, taken from Darisse's patrol car, which began at the time of the instigation of the stop.

7) Immediately prior to the vehicle coming to a complete stop on the shoulder the right brake light flickered on.

8) Darisse upon instigating his blue lights, observed a head "pop up" out of the back seat of the subject vehicle and then disappear.

9) Darisse upon approaching the vehicle observed the defendant lying in the back seat of the vehicle.

10) Darisse observed the defendant lying in the back seat underneath a blanket. Darisse informed the driver of the vehicle that he was being stopped for a non-functioning brake light and asked the driver to step out to the rear of the vehicle. The driver complied. Darisse engaged in a brief conversation with the driver, asking the driver if anything was wrong with the person in the back seat, from where the driver began travelling and his ultimate destination. The Driver informed Darisse that the defendant was tired and the pair were going to West Virginia. The driver was informed that the officer intended to issue him a warning citation so long as long [sic] documentation provided to Darisse was valid. Darisse took the driver's license and registration than [sic] returned to his vehicle. Darisse formed the opinion that the driver appeared nervous to him as he made poor eye contact and he was continuously placing his hair in a ponytail and then removing his hair from a ponytail. Defendant continued to lie in the back of the vehicle and did so throughout the entire stop until he was later approach.d by Darisse.

11) Officer Ward arrived at the scene of the stop. Ward was informed by Darisse that a subject was lying in the back of the vehicle underneath a blanket. Ward went to the

vehicle and asked defendant for his driver's license in order to determine his identity and check for outstanding warrants. The defendant complied and gave his driver's license to Ward without getting up from his position.

12) The driver continued to stand between Darisse's patrol car and the subject car as Ward asked for the defendant's driver's license.

13) The interaction between Ward and the defendant occurred in approximately one to two minutes.

14) The stop of the subject vehicle was initiated at approximately 7:55:40 a.m.

15) Darisse re-approached the driver and returned his driver's license and any other identifying documents he had received and gave the driver a warning citation. Darisse then asked the driver if he would be willing to answer some questions. The driver indicated by nodding his head that he had no objection to answering questions and stated he would answer questions. Darisse's tone and manner with the driver was polite, noon-confrontational and conversational.

16) The driver denied any type of contraband in the car.

17) The driver denied guns or large sums of cash in the car.

18) This conversation occurred within a period of a minute to two minutes.

19) Darisse then asked for permission to search the vehicle. The driver did not object to searching the vehicle, but informed Darisse

that the vehicle was the defendant's, and Darisse should make the request of the defendant. Darisse approached the defendant who was still lying in the back of the vehicle and asked for permission to search the vehicle. The defendant informed Darisse that he had no objection to the vehicle being searched, although the officers might have a problem because the inside of the vehicle was messy.

20) The tone and manner of Darisse when asking for permission to search the vehicle with the defendant was conversational, non-confrontational and polite.

21) Prior to Darisse returning the driver's license to the driver and issuing the warning citation to the driver Officer Ward had returned the defendant's driver's license to him.

22) The defendant gave his consent to search at approximately 8:08 a.m.

23) From the time the blue lights were initiated until the time the defendant gave his consent to search his vehicle approximately 13 minutes had elapsed.

24) Here under these fact[s]: where the driver was seized lawfully for a taillight being out, and the defendant was lying in the back seat of a vehicle covered by a blanket, and did not make any attempt to bring himself to an upright position during the entire vehicle stop, the officer's asking the defendant for his driver's license to determine his identity and any outstanding warrants is an intrusion so slight upon the

defendant's liberty when compared with and justified by the need of officer safety, that does not render anything that occurred subsequent to asking for the defendant's driver's license unconstitutional.

25) The driver, after all documents were returned to driver and defendant consented to an extended [sic] the period of detention as he voluntarily answered the questions of Darisse.

26) The defendant voluntarily extended the period of detention by consenting to a search of his vehicle after all documents were returned to both driver and defendant.

27) A reasonable person in the driver's situation and defendant's situation would feel free to leave after all documents were returned to the [sic] both the driver and the defendant, the tone of the officers were [sic] conversational and non-confrontational and the driver was told he was being issued a warning citation and that had been accomplished.

28) There is no indication of the driver or the defendant not being free to leave except that the Courts of this state were to adopt a bright line rule that any person dealing with a uniformed armed officer in a marked patrol car can never feel free to withdraw from the interaction with the officers.

The Court makes the following conclusions of law based upon the above findings of fact:

1. The initial stop of the subject vehicle was constitutional, as Darisse had a reasonable and

articulable suspicion that the subject vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light.

2. The lapsed time from the seizure of the vehicle until such time as the driver voluntarily extended the seizure of himself and the defendant the Court concludes was reasonable and was tailored to the issuance of a warning citation to the driver for failure to maintain properly working brake lights.
3. The Court concludes that the encounter between the officers, defendant and driver, became a consensual encounter at the time the driver voluntarily agreed to answer questions, after the warning citation was delivered to the driver and both driver and defendant had all documents returned.
4. The Court finds that the defendant extended the encounter further by consent and gave voluntary consent to allow his vehicle to be searched.
5. The Court concludes from the totality of the circumstances that a reasonable person in the position of the driver or defendant would have believed they were free to go without giving consent to further answer questions after the warning citation was delivered and all documents returned to the parties.
6. The Court concludes as a matter of law that there was no evidence that the actions of the officers overbore the will of the defendant or the driver to procure the consent to extend the encounter or the search of the vehicle.
7. The Court concludes that the seizure of the driver was constitutionally valid, and that the search of the vehicle was constitutionally valid.

Therefore the Motion to Suppress and Amended Motion to Suppress are denied.

This the 25 day of March, 2010.

/s/ [Vance Bradford Long]
HONORABLE VANCE BRADFORD LONG
Superior Court Judge Presiding

A TRUE COPY
Clerk of Superior Court
BY: */s/Sandra Hudson*
Assistant Clerk Superior Court

STATE OF NORTH CAROLINA

COUNTY OF SURRY

STATE OF NORTH CAROLINA

vs.

NICHOLAS BRADY HEIEN,

Defendant.

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
FILE NO. 09CRS51417, 51418

TRANSCRIPT

Transcript of Motion to Suppress held in the General Court of Justice, Superior Court Division, in Surry County, Dobson, North Carolina, on March 18, 2010, Criminal Session, before the Honorable V. Brad Long, Judge Presiding.

APPEARANCES:

TIM R. WATSON, ESQUIRE
Assistant District Attorney
P O Box 1063
Dobson, NC 27017

On behalf of the State.

HUGH MILLS, ESQUIRE
Attorney at Law
121 W. Atkins Street
Dobson, NC 27017

On behalf of the Defendant.

* * * *

[3] P R O C E E D I N G S

(WHEREUPON: These proceedings commenced at 10:10 a.m., March 18, 2010, in the presence of all counsel and all parties, and the proceedings were as follows:)

MR. WATSON: Number 192, Nicholas Heien, represented by Mr. Hugh Mills. Mr. Mills has made a Motion to Suppress in this matter. We would like to proceed at this time with that.

THE COURT: Go ahead, please.

MR. WATSON: Your Honor, I would like to call Matt Darisse to the witness stand.

MR. MILLS: Your Honor, if we may, in our motion there was a number 2, scope of the search. We would like to advise the Court we would not be proceeding on that. We discovered new evidence as to page 3 on 2, scope of the search. We will not be proceeding on that request.

THE COURT: So Motion to Suppress is for –

MR. MILLS: Your Honor, it is as to the stop and as to those procedures thereafter constituting search and seizure of the defendant.

THE COURT: All right. Go ahead.

SERGEANT MATT DARISSE, after being duly sworn, was examined and testified as follows during DIRECT [4] EXAMINATION BY MR. WATSON:

THE COURT: Thank you, Madam Clerk.

Q. Sir, please state your name for the Court and for the record.

A. Name is Matt Darisse.

Q. And how are you employed?

A. I'm employed with the Surry County Sheriff's Office.

Q. What's your rank and title there?

A. I'm a Sergeant with the Sheriff's Office.

Q. All right. And what is – how are you assigned right now? What are you doing right now?

A. We are conducting criminal interdiction mainly on Interstate 77 and 74.

Q. You say "we," who else is involved in that with you?

A. Myself and Deputy Ward.

Q. Is that Deputy Ward sitting on the front bench here?

A. Yes, that's him on the front bench.

Q. How long have you been involved in law enforcement?

A. I'm going on 20 years in law enforcement.

THE COURT: Sergeant, again, you said you were conducting drug interdiction? What kind of [5] interdiction?

THE WITNESS: Criminal interdiction.

THE COURT: Criminal interdiction on Highway 74?

THE WITNESS: Interstate 77 on this occasion. But we do work I-74 also.

THE COURT: Thank you.

Go ahead, please.

Q. You said about 20 years. Has that all been in Surry County?

A. Yes, sir, it has.

Q. And during that 20-year experience as a – in the Sheriff's Department what kind of things have you done other than interdiction?

A. I spent about 13, 14 years working narcotics investigations. I've also worked in the jail. Worked as a telecommunicator when I first stated.

Q. All right. How long have you been doing interdiction?

A. Oh, I believe a little over – under two years, maybe.

Q. Now, were you working interdiction on Interstate 77 on April 29th of last year?

A. Yes, I was.

Q. And was Officer Ward working with you? [6]

A. Yes, sir.

Q. Were you in two separate vehicles?

A. Yes, we were.

Q. All right. Did you have an occasion on April 29th of last year to encounter the defendant, Mr. Nicholas Heien?

A. Yes, I did.

Q. Tell the Court how you came in contact with him and with his vehicle.

A. I was on stationary patrol on 77 at approximately the 91 mile marker watching northbound traffic. I saw a vehicle pass my location; observed the driver of that vehicle appeared very stiff and nervous as he drove by me. So I pulled out.

Q. In what ways did you notice that he was stiff and nervous? What, what did he look like?

A. He was gripping the steering wheel at a 10 and 2 position, looking straight ahead.

Q. Go ahead. What happened next?

A. I pulled out onto I-77 northbound, observed the driving of the vehicle, and noticed that vehicle approach a slower moving vehicle, apply its brakes; and the right side brake light was out.

Q. What kind of vehicle was it?

A. It was a burgundy Ford Escort. [7]

Q. All right. When, when you saw the right side brake light was out what did you do?

A. I put my blue lights on to pull the vehicle over. And this was approximately the 94 mile marker. And the vehicle pulled over into the emergency lane.

Q. What time of day or night was it?

A. It was approximately 8:00 in the morning.

Q. 8 o'clock in the morning. In April?

THE COURT: 8:00 in the morning?

THE WITNESS: Yes, sir.

BY MR. WATSON:

Q. When the vehicle passed you do you recall whether or not the headlights to the vehicle were on?

A. When it passed me, no, I don't remember it being on. But when it was behind – when I was behind the vehicle you could see that it had its running lights, driving lights on.

Q. And at some point in time during the stop did the right side brake light come on?

A. Yes. After watching the, the video of the stop you could see that the right side brake light actually came on right when it was coming to a complete stop.

Q. How many times, if you recall, were the brakes applied when that right side brake light did not come on? [8]

A. I know initially when we were on 77 it was out then. And then as it was pulling over, when I applied – put on the blue lights, it was still out. So that's a second time. And then I guess a third time would be when it was coming on.

Q. But at least on a couple of occasions the right side brake light did not work.

A. That's correct.

Q. After stopping the car, what did you do?

A. When I put the blue lights on I noticed somebody in the passenger area popped his head up and then go right back down. So that was suspicious to me. That kind of made me kind of nervous. So I approached the passenger side. And as I was approaching the passenger side I noticed the passenger, which was the defendant, laying down in the back seat.

Q. In the back seat of the car. So did I understand you to say that he popped up and looked at you when you turned the blue light on?

A. Yes, when I put the blue lights on, popped up for a second, and went back down.

THE COURT: In what, where now?

THE WITNESS: In the back passenger area of the Ford Escort.

Q. So the defendant was not the driver? [9]

A. No, he was not.

Q. As you approached the car where was the defendant?

A. The defendant was in the back seat laying down.

Q. So you couldn't see him.

A. Not on the initial approach, no. But I knew somebody was back there from when he popped up quick and went down.

Q. Did you have any idea what he was doing when he laid back down in the car?

A. I had no idea what he was up to.

Q. When you approached the car where was the defendant? When you got to the car where was the defendant?

A. He was in the back seat laying down.

Q. Still laying down.

A. Yes.

Q. Did you speak to him?

A. Initially I spoke to the driver. Through the investigation, yes, I did eventually speak to him.

Q. What did you say to the defendant? What did he say to you while you was standing in the car; if you recall?

A. When I was explaining to the driver why I pulled him over for the brake light being out the defendant [10] asked me which light was out, and I told him.

Q. So he was awake.

A. Yes.

Q. And talking to you.

A. Yes.

Q. Could you see what he was doing laying down in the back seat?

A. Not exactly, no.

Q. All right. After speaking to him briefly at the door what did you do?

A. I spoke to the driver, asked him for his driver's license. The driver was fumbling through his wallet trying to produce a license. Of course, that made me nervous, too. So I asked him to step out of the vehicle, and he could just give me his license at the back of the vehicle. The driver did get out, came to the rear of the vehicle, and finally produced a driver's license.

Q. During the time you were talking to the driver in the vehicle and outside the vehicle what was the driver's demeanor?

A. As I said, he was nervous, fumbling through his wallet.

Q. Any other activity that made you think he was nervous? [11]

A. Yes. Asking him questions, he made poor eye contact with me. He was rubbing his head constantly.

Q. And once the driver got out of the car and came back behind the car he was in what did you do?

A. I received the driver's driver's license. Of course, explained to him why I pulled him over. Then I went back to my patrol vehicle to run his driver's license, make sure his license was valid, and . . .

Q. When you got back in your vehicle where was the driver?

A. He was standing outside to the rear of the vehicle he was driving.

Q. Was he standing between your car and the car he was driving?

A. That's correct.

Q. Where was the defendant while you were sitting in your car?

A. The defendant was still laying down in the back of his vehicle.

Q. So he didn't sit up.

A. No, he did not.

Q. He didn't get out of the vehicle.

A. No, he did not.

Q. At that point you were, you were alone, is that right, with these two people? [12]

A. Yes, at that point.

Q. At some point in time did Officer Ward arrive on the scene?

A. Yes, Officer Ward arrived to assist me with the vehicle stop.

Q. All right. And what happened when Officer Ward arrived?

A. When Officer Ward arrived he came up to my vehicle. I explained to him what was going on. And Officer Ward went to the passenger side to talk to the passenger and received the passenger's identification, so we could check him for warrants.

Q. When Officer Ward approached the vehicle where was the defendant?

A. Defendant was still laying down in the – in his vehicle.

Q. All right. While – did you, were you watching while Officer Ward spoke to the defendant?

A. I was looking up periodically, yes. As I was running the driver's license I was trying to keep an eye on what was going on for officer safety.

Q. And you were in your car.

A. That's correct.

Q. Could you hear what Officer Ward was saying to the defendant? [13]

A. No, I could not.

Q. What's your best estimate of how long Officer Ward spoke to the defendant at the car?

A. Maybe a minute or two.

Q. During that minute or two conversation did the defendant sit up?

A. Not that I recall, no, he didn't.

Q. He didn't get out of the car?

A. No, he did not.

Q. Had you talked to the driver about anything other than the brake light being out? Had you asked him where they were going, where they were coming from, things like that?

A. Yes, general conversation. I asked him where he was coming from, where they were going to.

Q. Do you remember what he told you?

A. Yes. Best I remember, he picked up the defendant somewhere in Hickory, I believe; and that they were going to West Virginia to visit a friend.

Q. Now, after Officer Ward spoke to the defendant what did Officer Ward do?

A. Officer Ward came back to my patrol vehicle, gave me the defendant's license so I could run it, and told me the story that the defendant told him; and that they were actually going to the – the defendant – [14] going to Kentucky, not West Virginia.

Q. So Officer Ward told you that the defendant told him they were going to Kentucky, not West Virginia.

A. That's correct.

THE COURT: Say that again, please. The last about not going – Just repeat the last part of your testimony.

THE WITNESS: Yes, Your Honor. When Officer Ward came back to my vehicle he told me that the defendant had told him that they were actually going to Kentucky; whereas the driver had told me that they were going to West Virginia.

THE COURT: All right. Thank you.

BY MR. WATSON:

Q. All right. Was there any information from Officer Ward about the defendant saying that he and the driver were roommates?

A. At that time, no, I don't recall that being said. Afterwards, yes.

Q. All right. Now, during the entire time Officer Ward was talking to the defendant you were working on the warning ticket for the driver; is that right?

A. Yes, I was writing out a warning ticket for a brake light, improper equipment.

Q. And, and at some point in time after Officer Ward [14] came back to your vehicle did you get out and speak to the driver anymore?

A. Yes. I got back out, spoke to the driver, explained to him the warning ticket. And after I gave him his driver's license, all his documentation back, he was free to go. And I actually asked him if he had any questions. He didn't. I asked him if he minded answering some questions. And he answered some questions that I had.

Q. All right. Now, so you had, you initially had the driver's driver's license. You had his registration to the car. And you, you have any other documents that belonged to him?

A. That was it as far as the driver.

Q. All right. So when you got back out you gave the driver his license back; is that right?

A. That's correct.

Q. You gave the driver his registration back?

A. That's correct.

Q. And you gave him the warning ticket and explained it to him?

A. That's correct.

Q. All right. Did you ever ask the driver to answer any questions before you returned all those documents?

A. No, I did not. [16]

Q. All right. Where was the defendant when you gave the driver his license and registration and warning ticket back? Where was the defendant?

A. The defendant was still laying down in the back of his vehicle.

Q. Officer, you've been in law enforcement, you said, almost 20 years. During that time you have an estimate or a guess how many vehicles you've stopped?

A. I've stopped over 100, I'm sure. It's probably a whole lot more than that. I never really kept track.

Q. During your 20 years of experience have you ever encountered a defendant, or a suspect, or a person in a – passenger in a car who laid down during an entire traffic stop?

A. No, I have not.

Q. Did you find that to be unusual?

A. That was very unusual.

Q. When you were checking the registration of the car and the driver's license of the driver were you able to determine who the car belonged to?

A. Yes. It belonged to the defendant.

Q. So it did not belong to the driver.

A. No, it did not.

Q. It belonged to Mr. Heien.

A. That's correct. [17]

Q. When you asked the driver, after you gave him his license, registration and warning ticket back and asked him to answer some questions, what did he say?

A. I asked him what was wrong with his friend laying down in the back seat. And he said he picked him up, and that he was just tired.

Q. Okay. When you asked him, "Do you mind answering some questions," what did he say?

A. He didn't mind. And he answered my questions.

Q. Did, did he actually come back? Was he walking toward the car when you asked him if he would answer some questions?

A. Yes, he made a move to go back to his car.

Q. All right. When you said, "Can I ask you some questions," what did he do?

A. He turned back around to answer my questions.

Q. What did you ask him then?

A. Again, I asked him about what was wrong with the passenger. I also asked him about if he had anything illegal in his vehicle, any kind of drugs. And I went through each specific drug. I asked him about any weapons, any large amounts of cash in the vehicle, which he answered "No" to every one of them.

Q. Did you ultimately ask him if you could search the vehicle and make sure? [18]

A. Yes, I did.

Q. What did he say?

A. That he didn't mind, but it wasn't his [illegible] that I would have to ask the passenger.

Q. And the passenger was still in the back seat laying down?

A. That's correct.

Q. And what did you do at that point?

A. I went to talk to the passenger, which is the defendant.

Q. Okay. Tell the Court what you did when you walked back to the car.

A. Walked back. He was still laying down. And I asked him basically the same questions I did the driver about anything illegal in the vehicle. And then I asked him for a consent to search the vehicle, which he gave me verbal consent to search the vehicle.

Q. All right. And when he gave you consent, is that when he got out of the car?

A. Yes. I believe he put on some flip-flops and got out of the vehicle.

Q. Do you recall, or do you know what the driver's name was?

A. Yes. Maynor Javier Vasquez.

Q. Vasquez. So Mr. Vasquez, he's not in the [19] courtroom, is he?

A. I do not see him in the courtroom.

MR. WATSON: Your Honor, that's all on the stop and the search as far as this witness from the State.

THE COURT: Thank you, Mr. Watson.

Yes, sir, Mr. Mills.

CROSS EXAMINATION by MR. MILLS:

Q. Mr. Darisse, when you first saw the Ford Escort were you sitting stationary, stopped?

A. Yes, I was.

Q. How fast was the automobile going at the time that you first saw it?

A. I really didn't estimate the speed. He wasn't speeding. Just normal speed for I-77.

Q. Okay. In your report, your narrative, you estimate about 60 miles per hour in a 70 zone. You think that's accurate?

A. That's as when I pulled out and started to approach his vehicle, that's when I estimated that speed.

Q. What is included in police interdiction? What does that mean?

A. It's – you're looking for criminal indicators of drivers, of passengers also. [20]

Q. Before this day had you received any information from any source about Mr. Vasquez or Mr. Heien or the vehicle?

A. No, I had not.

Q. The paper that you issued to Mr. Vasquez was a warning ticket, not a infraction ticket; is that correct?

A. That's correct.

Q. Now, when Mr. Heien did talk with Officer Ward did he sit up in the car, sit up the way he normally would to speak to somebody?

A. Not that I saw, no.

Q. Were you busy at that time talking with Mr. Vasquez and giving him the ticket?

A. I was actually in my vehicle writing out the warning ticket.

Q. And so it's possible that Mr. Heien was sitting up and talking with Officer Ward during that time; is that correct?

A. From what I saw, I never did see him sit up.

Q. When you asked him to step out of the car did he step out and walk around the vehicles there?

A. The defendant?

Q. Yes.

A. When I asked him for consent he put on some [21] flip-flops and came out of the vehicle, yes.

Q. Okay. Did you take some videos from your car that morning?

A. Yes. When the blue lights are turned on the video automatically starts up.

Q. And about the car, after you had finished questioning the defendants and searching the vehicle, was the car towed?

A. Yes, it was.

MR. MILLS: No other questions at this time, Your Honor.

THE COURT: Thank you. Anything further for the State?

REDIRECT EXAMINATION by MR. WATSON:

Q. So Officer Darisse, the car was towed after this incident?

A. Yes, it was.

Q. And you testified that the brake light did not work a couple of times and then the brake light worked. Did you ever go back, you or Officer Ward ever go back and check that brake light again?

A. Yes, we did.

Q. Tell the Court about that.

A. Yes, we went back to check and make sure. Because I reviewed my tape and you could see when it [22] was pulled over to the side of the road that it was working. So I wanted to make sure that it was actually out. We tried it several different ways. It worked. And then on a final try where we put the vehicle in gear, pressed the brake light, and it was out at that time.

Q. You and Officer Ward together when you checked that car again?

A. Yes. Officer Ward was actually the one that made the observation that it did go out.

MR. WATSON: That's all, your Honor. Thank you.

THE COURT: Yes, sir.

MR. MILLS: Please the Court, we would –

THE COURT: Any further questions for the officer?

MR. MILLS: Oh, I'm sorry, Your Honor. No, sir.

THE COURT: Thank you, Sergeant. You may step down.

Anything further for the State?

MR. WATSON: Yes, sir. Like to call Officer Ward to the witness stand.

DEPUTY MARK WARD, and after being duly sworn, was examined and testified as follows during DIRECT [23] EXAMINATION by MR. WATSON:

Q. Sir, please state your name for the Court.

A. Mark Ward.

Q. And how are you employed?

A. I'm with the Surry County Sheriff's Office.

Q. And how long have you been working for the Surry County Sheriff's Department?

A. Almost 16 years.

Q. How long have you been in law enforcement all together?

A. Almost 16 years.

Q. All right. During – or you've heard Officer Darisse testify in the courtroom this morning; is that right?

A. Yes, sir.

Q. And you were working with him on the interdiction team on Interstate 77?

A. Criminal interdiction, yes, sir.

Q. What other things besides interdiction have you done in your 16 years at Surry County Sheriff's Department?

A. 1994 I started out as a law enforcement clerk working in the office. From there I went to the patrol division. Went from patrol division to civil division. Went from the civil division back to the [24] patrol division as a K-9 handler. From there I went from that to a bailiff. From a bailiff I went to school resource officer. Then went into teaching DARE, working as a narcotics investigator. Into special operations. And then into what I'm – criminal interdiction now. I've done a lot.

Q. I should have asked what haven't you done. Been a shorter list. All right. Now, were you also working with Detective Darisse on April 29th, 2009?

A. Yes, sir.

Q. And did you respond to a stop that he had made of a vehicle that belonged to the defendant?

A. Yes, sir.

Q. When you arrived at the scene tell the Court what you saw as you rolled up there.

A. When I got there I was behind Sgt. Darisse's car. Come around to his window, which we normally do,

just kind of find out what's going on. Noticed that the driver was standing at the back of the vehicle that Sgt. Darisse had stopped. And was informed that there was another person in the car, which I could not see at the time, and that he was laying down.

Q. So when you walked up there you could not see the defendant?

A. No, sir. [25]

Q. All right. As a result of all that information what did you do?

A. Well, it puts into your mind that, you know, that's a concern. I did go up and speak to him, the defendant.

Q. So you approached the car on the driver's side or passenger side?

A. Passenger side, for safety reasons.

Q. All right. Tell the Court what happened when you walked up to the car.

A. Basically made contact with him. That's to observe what he may or may not be doing. Asked him, I think, if he was okay. Made some conversation with him about, you know, what they were doing, where they were going.

Q. Now, the time while you were talking to him where was the defendant?

A. He was still laying in the back.

Q. So he carried on a conversation with you while he was laying in the back seat?

A. Yeah. Yeah, I even asked him if he was okay.

Q. What did he say when you asked him if he was okay?

A. He indicated – he didn't indicate that there was anything wrong. Just that, I think, he was maybe – [26] he may have said he was tired.

Q. You said you asked him – made conversation with him.

A. Um-hmm.

Q. What did you ask him and what did he say?

A. Asked him where they, where they were headed to. And he said they were going to Kentucky to pick up a friend. And I asked him about the driver, you know. I believe it was in reference to how well he knew him. And that they were – the way I took it – that they were roommates. And also got his ID from him. That was so Sgt. Darisse could run it. It was just unusual situation.

Q. You said the way you took it they were roommates. Did the defendant tell you that?

A. I believe he did, yes.

Q. And you asked for his ID?

A. Yes, sir.

Q. Anything else you can recall?

A. Not, not, not, not, not anything specific that jumps out. Just other than it was – he was laying down. And I just – that, to me, was just a – it just – as an officer it's just not something – I've had instances where I stopped vehicles where people where [sic] laid back in seats or even laying down. And the [27] first thing they do, of course, is they raise up and want to see what's

going on. And it just wasn't – It was just kind of like: You don't see me, I'm not here. And it makes, makes you concerned. You want to see everybody when you're when you're encountering them.

Q. In your 16 years of experience as a Deputy Sheriff how many vehicles would you say you've stopped or been involved with?

A. Whew. I think we counted last year, between us two we stopped maybe 700 vehicles –

Q. All right.

A. – in a year.

Q. So in your 16 years of experience have you ever had the owner of a vehicle or the passenger of a vehicle lay down during an entire stop?

A. No, sir. They usually pop right up and want to know what's going on.

Q. What could he have been doing in the back seat when you couldn't have seen him?

A. Anything. I mean –

MR. MILLS: Your Honor, this is a motion. And we're trying not to object. But that's speculation, I contend.

THE COURT: Sustained. I'll let you ask the [28] officer if he had concerns for his safety. But those might be – just general what this gentleman could have been doing, I'll sustain to that question.

Q. What about, what about the defendant's conduct, if anything, concerned you or made you suspicious?

A. Well, anytime that you can't see – when you're on a traffic stop, anytime you can't see somebody, you

know they're there, it's always in your mind. Because you don't know, you don't know that person and you don't know what they could be doing. And that's a concern. That's how we as officers die. You can't relax one moment on a stop. Because from your car door to making contact with them I can refer to that as a dead zone. Because anything that happens, you know, you're the one that has to react, not make the act.

Q. Now, after you spoke to the defendant in the back seat of his car did you go back, did you go talk to the driver at all?

A. I, I spoke to him briefly on the way back to Sgt. Darisse's car.

Q. Okay. Why?

A. Just, just the circumstances, it just, to me, was – it was not – it wasn't normal. Just wanted to kind of want to see what the driver had to say. [29]

Q. What did he say?

A. I talked to him briefly. Kind of the same kind of conversation. He stated that they were going to West Virginia and that – and I asked him about living, where he lived. And he said that he lived in one – I can't remember exactly – one place. And I said, well, you know, that the defendant lived in another location.

Q. So the driver told you they lived in separate locations.

A. Yeah. Yes.

Q. All right. Were you present there with Officer Darisse and the driver when Officer Darisse got out of his car and gave the driver his documents back?

A. Yes, sir. I was back a little bit at the –

Q. Were you standing between the car with them?

A. Yeah. I could see, yeah.

Q. Could you see and hear what went on?

A. Out there, yeah, you, you see what's going on clearly; but sometimes, you know, tractor-trailer comes by it's hard to hear. But, yeah.

Q. Did you see Officer Darisse give the driver his driver's license back?

A. Yes.

Q. Did you see Officer Darisse give the driver his [30] registration back?

A. Yeah, he gave him all his paperwork back.

Q. Did you see Officer Darisse give the driver his warning ticket?

A. Yes.

Q. Did you hear Officer Darisse explain the warning ticket to him?

A. Yes.

Q. Did you observe the driver do anything after all his documents were returned to him?

A. Yeah. He – after, you know: You got any questions or anything, you know, all right, he turned like he was going back to the, to drive his car, drive off.

Q. All right. Did you hear Officer Darisse ask him a question?

A. Yes.

Q. What did he ask him?

A. Do you mind – "Hey, do you mind if I ask you some questions?"

Q. What did the driver do at that point?

A. He turned and come back.

Q. All right. And were you present when Officer Darisse asked the driver about drugs and weapons in the car? [31]

A. Yes.

Q. Did you also ask him questions?

A. I believe, I believe when there was – there was a series of questions that were asked. And I, I asked, you know, about maybe some, two certain drugs, I believe, during that.

Q. And did you hear Officer Darisse ask the driver if he could search the car to make sure those things were not in there?

A. Yes, sir. I believe that was right after the questions.

Q. What did the driver say?

A. Yeah, well, it was – it wasn't his car. But you know, we had to end up asking the defendant.

Q. Okay. During this whole encounter where was the defendant?

A. Still laying down in the back.

Q. Were you present when Officer Darisse walked over to the defendant and talked to him at the car door?

A. To get him out, yeah. He walked around to the passenger side and asked him, talked to him.

Q. Did you hear Officer Darisse ask him for consent to search?

A. I don't know if I heard the exact words of that or not. Like I said, sometimes, you know, out there [32] it's kind of hard to hear.

Q. The driver, or excuse me, the defendant then got out of the car?

A. Yeah. Yes.

Q. All right. And that's when the search was conducted?

A. Yes, sir.

Q. All right.

A. I do, I do remember a specific question that Sgt. Darisse asked him about if there was anything in the car that wasn't theirs. And the defendant, along with the driver, pointed at a certain bag.

Q. Okay.

A. He said it was their friend's, I think, that they were picking up.

Q. And what, if anything, was found in that certain bag?

A. That was where the narcotics was located.

Q. After the defendant gave Officer Darisse consent to search the car –

A. Um-hmm.

Q. — did you and Officer Darisse search the car?

A. Sgt. Darisse did. I kept a eye on the people outside the vehicle. And I may have helped a little bit at some

point. But usually I, one of us will [33] watch just to make sure that nothing happens. Because you know, when you're searching the car you're in the car, back turned sometimes, and you can't see what people out there are doing. And that's dangerous. And plus watch to make sure nobody runs over you.

Q. Okay. What ultimately was found in the car?

A. Cocaine.

Q. How much?

A. I think it was two ounces.

Q. A trafficking amount?

A. Yes, sir, anything over 28 grams.

MR. WATSON: That's all for the State for this witness, Your Honor.

THE COURT: Thank you.

Yes, sir.

CROSS EXAMINATION by MR. MILLS:

Q. Were videos being made from your car at the time of this stop, Mr. Ward?

A. Yes, sir. Yes, sir.

Q. And that's been placed in the possession of the District Attorney?

A. I believe they're sitting on your desk, sir.

Q. Prior to the stop had you received any information from any source about Mr. Vasquez, or Mr. Heien, or the car itself? [34]

A. No, sir.

Q. Were there any videos made of the second test that Officer Darisse referred to when the two of you went out to look at the car after it was towed?

A. You mean as far as video?

Q. Yes, sir.

A. No.

Q. When you first spoke with the defendant through the window did you walk away for a few moments and then come back to ask him for his license?

A. I don't remember. I don't remember. I may have. I don't, I don't remember.

Q. Okay.

A. I may have stepped away and said: Oh, yeah, yeah. I don't remember. It will be on the video, I'm sure.

MR. MILLS: No other questions at this time. Thank you.

THE COURT: Thank you, sir.

Mr. Watson.

MR. WATSON: Just a couple, Your Honor.

REDIRECT EXAMINATION by MR. WATSON:

Q. I forgot to ask you, Officer Ward, were you present when, with Officer Darisse when he went back to the vehicle and checked that brake light again? [35]

A. Yes, sir, I was.

Q. Tell the Court what you observed.

A. That it was not working. It, it – when we first got there and tried it it did. But when we cranked the car

and put it in gear and hit the brakes it did not. It appeared to be a wiring problem, in my opinion.

MR. WATSON: That's all, Your Honor.

MR. MILLS: No, sir.

THE COURT: Yes, sir. Thank you, sir.

THE WITNESS: Thank you, Judge.

MR. WATSON: That's the evidence for the State on the Motion to Suppress, Your Honor.

THE COURT: Thank you, Mr. Watson.

Mr. Mills.

MR. MILLS: Your Honor, may we be heard briefly before we present our evidence?

THE COURT: Yes, sir.

MR. MILLS: Your Honor, we would ask the Court to consider these pieces of testimony given by Officers Ward and Darisse. First, Officer Darisse was in a stationary position. And his only reason for paying attention to this car, which was going about 60 miles an hour, estimated, was that the driver appeared stiff and nervous. Ask the Court to consider [36] whether any person could from a stationary position gain any reasonable articulable suspicion for following another car at that speed and to have noticed a driver in this detail.

Joined with that is the question of whether the Officer saw a malfunction, alleged malfunction of the brake light on Highway 77, prior to blue lights being instituted, being flashed on.

Going to the other matter, Your Honor, the search and the seizure, there was one or two – there were one

or two extremely important points in time. The first extremely important point was where Officer Ward went to the defendant to get his ID and search for warrants. Officer Darisse says that this is the reason and purpose for which he went over to gain Mr. Heien's identification. And that was to run the license number and other information through the system to see if there were warrants. We contend that that point, when Officer Ward first approached, there was no reason to begin an investigation of the defendant. The fact that he was in the vehicle, even the fact that he was lying down, did not give them suspicion that this man had been or was involved in criminal activity of any kind; yet an investigation began and the license was taken. [37]

The other point in time we ask the Court to consider is the moment that the driver, Mr. Vasquez, had his license returned to him, at that very moment Officer Darisse says he was free to leave. At that very moment there was no information to arise to any kind of articulable suspicion or probable cause to delay the defendant, the passenger, who at that moment had performed no act, done no thing which would give them cause to extend that stop and that investigation.

We would like to hand up, if we may, Your Honor, two cases. One is a new case from August of '09, *State v. Jackson*. And the other one is a case, Your Honor, which is cited in that case, *State v. Falana*, which has facts extraordinarily identical to the facts just summarized by the two officers.

May we approach the bench?

COURT REPORTER: Can you spell the second case for me, please.

MR. MILLS: Yes, ma'am. State v. F-A-L-A-N-A. These, Your Honor, apply to the search and seizure question.

THE COURT: I've got *Jackson* and a case summary?

MR. WATSON: Yes, sir, Your Honor. I'm sorry. There was supposed to have been a copy of that [38] case attached with *Falana*.

THE COURT: Okay. Thank you.

MR. MILLS: Thank you, Your Honor.

THE COURT: Thank you.

MR. MILLS: So Your Honor, on page 7 and 8 of the *Jackson* case we put brackets on some of the important matters. That's our brackets.

THE COURT: Thank you. Okay. You wish to be heard further?

MR. MILLS: Yes, sir. We would like to play the tapes for the Court. Not on our immediate request –

THE COURT: I'm a little bit – you guys are going to have to explain to me exactly what we're doing. I'm a little bit – if we're doing like a motion to allow the, a motion to allow the Motion to Suppress at the close of the State's evidence, I'm a little unfamiliar with that. You guys have to explain to me procedurally what we're trying to do here today.

MR. MILLS: Your Honor, my understanding is the State has completed their evidence. And in order to save time we simply wanted to ask whether the Court chose to rule at this time, based on what we handed up, or whether we should proceed with our evidence.

THE COURT: Well, you know, I don't want to [39] rule until I've seen all the evidence.

MR. MILLS: Yes, sir.

THE COURT: If there's any other evidence to be seen I want to see it.

MR. MILLS: Yes, sir.

THE COURT: Okay. I can see it good if you guys – I can move around, or you guys can move around, whichever.

MR. MILLS: Be glad to stand right over there, okay with the DA.

THE COURT: The defendant is welcome to stand over there as well.

Let the record reflect the Court is preparing to view a video of the stop. And Court's given permission to both the State and defendant and defendant's counsel, both, to move and position themself in the courtroom so they'll be able to move and view the screen.

MR. WATSON: Your Honor, this is the stop. This is the video from Matt Darisse's vehicle. I'd ask Officer Darisse be able to come back up to the stand so he can see it, and so he may be questioned about that when the time comes.

MR. MILLS: Yes, sir, please.

And please the Court, Mr. Watson is far [40] better at mechanics and technology than I am, so he'll run the machine if that's all right.

THE COURT: All right.

(WHEREUPON: the video was played for the Court.)

MR. MILLS: May counsel question Mr. Darisse at the proper time, please?

THE COURT: Yes, sir.

MR. WATSON: I can rewind it and show it.

THE COURT: Rewind it again, please.

(WHEREUPON: The video was played for the Court again.)

SGT. MATT DARISSE, after being duly sworn, was examined and testified as follows during CROSS EXAMINATION by MR. MILLS:

Q. Mr. Darisse, this shows 6:55 and 44 seconds. Is that you following the vehicle?

A. Yes, sir.

Q. Now at 6:55 and 56 were both taillights burning? Excuse me. Both brake lights burning?

A. Right now they are, yes. Yes, sir.

Q. Yes, sir. Now at 6:56 and 14, were the lights turned back on after that, that you recall, after that point in time?

A. After this point in time? [41]

Q. Yes, sir.

A. I can't recall if they were turned back on. You mean, if the driver turned the lights back on?

Q. On the scene, yes, sir.

A. No, I don't believe he turned them back on.

MR. MILLS: Okay. Your Honor, could we rewind it once more, please?

THE COURT: Yes, sir.

(WHEREUPON: The video was played for the Court again.)

Q. Officer, this white car has nothing to do with this, does it?

A. That has nothing to do with it. It was a prior stop on a different day.

MR. MILLS: All right. Your Honor, could we let the record reflect that the lights went out at approximately 6:56 and 14 seconds?

THE COURT: Okay.

THE WITNESS: May I say something?

THE COURT: Just hold on one second. Switching back and forth. I give Mr. Watson and Mr. Mills a chance to examine.

Let the record reflect that upon viewing the video the Court finds that apparently the engine was – of the car in which the defendant was [42] traveling, was turned off, and the turn signal, brake lights and running lights of the vehicle were turned off at 6 – 6:56.

Okay. Go ahead.

MR. MILLS: Your Honor, hereafter there will be about 10 minutes that we think is important to the motion. So we would ask the District Attorney would let it go forward and, if we may, stop at times from time to time to ask Officer Darisse questions.

THE COURT: Well, I stopped Officer Darisse from volunteering things. So I guess –

Mr. Watson, I'll give you an opportunity to examine Officer Darisse after Mr. Mills had a chance to cross examine him.

(WHEREUPON: The video continued to play.)

MR. MILLS: Your Honor, that's the portion we'd present to the Court. At 7:08. Yes, sir. We would agree that the remainder of these events, based on what was seen on the video, were as the Officer has described.

THE COURT: Thank you.

MR. MILLS: May we question Officer Darisse, please, your Honor?

THE COURT: Yes, sir.

BY MR. MILLS:

Q. Officer Darisse, how long did it take for the dispatcher or person that you called to give you the report on Mr. Vasquez?

A. They give it right back; immediately.

MR. MILLS: No other questions for this witness. Thank you, Your Honor.

THE COURT: Thank you.

Yes, sir, Mr. Watson.

MR. WATSON: Judge, may I approach the witness?

THE COURT: Yes, sir.

REDIRECT EXAMINATION by MR. WATSON:

Q. Officer Darisse, I'm going to rewind this just a little bit. You described the defendant – the driver as being nervous.

(WHEREUPON: The video was played again simultaneously with examination.)

A. Yes, sir.

Q. Can you tell us the kind of things that made you think he was nervous?

A. Him taking his hair out of a little ponytail and [44] putting it back on.

Q. Now, I have some trouble hearing this. Is that – did you say, "I'm giving you your ID and information back?" Is that what you said?

A. That's correct.

(WHEREUPON: The video continued to play again.)

Q. "You mind if I ask you a few questions?" Is that when he shook his head yes?

A. That's correct.

Q. Now at this particular time is the defendant still laying in the back seat?

A. Yes, he is.

MR. WATSON: I believe that's all the questions I have, Judge.

THE COURT: Thank you.

Mr Mills, other questions for the officer?

MR. MILLS: No, sir. Thank you.

THE COURT: Thank you.

You can step down, Sergeant. Thank you.

THE WITNESS: Thank you.

THE COURT: Yes, sir.

MR. MILLS: Please the Court, may we tender the tape that's just been shown to the Court and ask it be admitted as Defendant's Exhibit 1 in this [45] motion?

THE COURT: Let the videotape that was played in court, which was taken from Officer Darisse's patrol car on this occasion, be admitted as Defendant's Exhibit 1 for the purpose of this hearing.

MR. WATSON: Your Honor, there was one other thing I meant to ask Officer Darisse and I forgot it. I meant to go back to the beginning where that brake light appeared to be out.

THE COURT: I don't know about the Madam Clerk and Madam Reporter, but I don't know if we had a break. I need to use the bathroom. So let's take a, let's take a 10-minute break, and we'll pick back up with this. Okay?

(WHEREUPON: Court recessed at 11:48 p.m., and court resumed at 11:55 a.m., in the presence of all counsel and all parties, after which the following proceedings were had:)

MR. WATSON: I just have a couple more questions of Officer Darisse about the video, Your Honor.

REDIRECT EXAMINATION CONTINUED by MR. WATSON:

Q. Officer Darisse, you testified earlier that the, the left side brake light was working, but the right side

was not, at least on a couple of occasions when [46] the brake was pushed; is that right?

A. That's right.

Q. And then the right side came on.

A. That's right.

Q. Would your videotape help you illustrate that testimony?

A. Yes, it would.

Q. Go ahead and describe it as it's going.

(WHEREUPON: The video was played again.)

A. At this time the left brake light is on and right brake light is not working. And now the, the right brake light does come on. And there they're actually operational right now.

Q. Rewind.

(WHEREUPON: The video was played again.)

A. Okay. Brake light comes on left side, right side it's not illuminating.

Q. But the running light is on.

A. Yes.

Q. Just not the brake light.

A. That's correct. Still off. Got the left side brake light's on, right side is not working.

Q. I notice the time up there says 6:55. Is that time right?

A. That time is not right. It's a hour behind. [47]

Q. So it's 7:55 as opposed to 6:55.

A. That's correct.

Q. Anything else about this video you want to relate to the Court?

A. No.

MR. WATSON: Thank you, Your Honor. That's all.

THE COURT: Thank you.

Any further questions, Mr. Mills?

MR. MILLS: No, sir. Thank you.

THE COURT: Yes, sir.

You may step down.

Yes, sir.

MR. MILLS: Your Honor, we would ask that the Court accept into evidence the incident report and narrative that was prepared by Officer Darisse. A copy of that is attached to our motion as an exhibit. We would ask it be introduced with Defendant's Exhibit 2, marked thereto.

THE COURT: Motion allowed.

MR. MILLS: We'll present no evidence, Your Honor. Would like to be heard at the proper time.

THE COURT: Go ahead, please.

MR. MILLS: I'm sorry, Your Honor.

THE COURT: Yes, sir. Go ahead, please. [48]

MR. MILLS: Thank you, Your Honor.

Please the Court, we know that these matters are fact specific. There are many cases going both ways both in federal and state courts. In this situation we would ask the Court in regard to the stop to determine

whether or not, first, the officer viewing the person who looked suspicious going 60 miles an hour from a stopped position is enough to begin an investigation or following for search or attempt to stop; and second, whether the Court has heard evidence whether there was any malfunction in any part of the vehicle prior to blue lights being activated.

The VHS shows that there was an observation after the lights were violated (sic). But we think that there must have been evidence by the State that those two things, his view of a driver looking suspicious and some other malfunction before the blues lights were turned on must be shown to satisfy the rules in these types of cases.

Most importantly, Your Honor, we would ask you to consider these vital times that we've already mentioned to the Court after Mr. Vasquez was stopped and questioned as the driver.

We hand up a summary of *Falana* because the [49] facts, we say, are very similar to these. At 8:00 a.m. on a Wednesday morning the people in those, in that case were stopped. And the trooper was about to give a warning ticket. And he asked a Mrs. Simmons if she had any identification. She was apparently the passenger there. And she had a North Carolina identification card – excuse me – South Carolina identification card.

Another trooper arrived afterwards; observed that the lady appeared, excuse me, that the defendant, Mr. Falana, appeared nervous. And they questioned whether those two people had given the same information about where they had been. That was a big factor here. And in the case before the Court,

whether the defendant, whether the defendant and Mr. Vasquez gave an identical comment as to their final destination is similar to the *Falana* case. One of the gentlemen said: We're going to West Virginia; and the other one apparently said: We're going to Kentucky. Those are straight up 77, and West Virginia is between here and Kentucky. So in the objective view of this with the officers, based on that alone, had enough to question whether there's some criminal activity involved, and whether a delayed stop is merited. [50]

Finally, the Court observed in the *Falana* case that many people become nervous, and that their variance in statements at that time was not enough to show that criminal activity was afoot, and ruled that the Court should have suppressed that evidence.

Here the summaries of these two people were not identical, as it was not in *Falana*. But there's another part of what happened and what's shown on the video that we contend is extremely important. The question is when did the stop stop.

THE COURT: Right.

MR. MILLS: The speeding ticket or –

THE COURT: Doesn't the whole thing come down to consent? Isn't that what we need to focus on?

MR. MILLS: Yes.

THE COURT: I mean, the *Falana* case turned on the *Falana* case, they specifically asked for permission. They got, he asked Cardwell Trooper Cardwell, "Do you have a warrant?" Trooper Cardwell said, "No, I don't have a warrant." "Then why are y'all searching my vehicle?" Trooper Cardwell said, "Well,

I'm going to run the dog around your car anyway." So I mean, that's got nothing to do with consent.

But the other case you handed up [51] specifically cites other cases that say the detention may be extended after a reason, after a brief investigatory stop; may be suspended by reasonable and articulable suspicion or if the stop becomes consensual. Isn't that what we're talking about here?

MR. MILLS: Yes, sir. Yes, sir. Yes, sir. We say that when the Officer had a chance to get information back very quickly, and allow Mr. Vasquez to leave, that was the point at which the stop should have stopped. Instead, another officer arrived and questioned the defendant, put his head into the window, and then walked away, and for some unknown reason, really, at that point asked for the ID. From the video it sounded as though the officers were looking for a way to question the defendant who was lying down in the seat with no real suspicion that he should be investigated. But the investigation did begin. It began after a few moments had passed, and Mr. Vasquez was free to leave, and the license was taken from the defendant.

Even if they had suspected that these gentlemen were doing something they shouldn't, that in itself began a total separate investigation of the defendant when there was no suspicion that he or Mr. Vasquez at that point had anything in the car, [52] that they had stolen anything, that there was any contraband in the car. So the Vasquez matter ended. The papers were returned to him. And prior to that the investigation of the defendant had already begun with no, for no apparent reason. For no apparent reason.

Vasquez gave no consent. The defendant gave consent. But that came after the officers had questioned them about the destination, questioned them about where they had stayed the day before. Matter of fact, the investigation of the defendant, we contend, started the moment that the officer approached Mr. Vasquez. And he was asked numerous questions. And fine, that's all right. But once the license was returned to Mr. Vasquez and then subsequently the license taken from Mr. Heien this was a total new event, a total new investigation. There, there was at that point no reasonable articulable suspicion that these fellows had done anything other than drive up 77 North.

And, again, we say – we realize it's fact specific. But if there was consent given by the defendant we maintain that it came at a time when he was being unreasonably detained, after the driver had had his license returned, after he had had his own [53] identification checked; and still even at that point inadequate evidence to detain him, question him, or ask for his consent.

So we appreciate the Court hearing us. We would ask that you rule that on these details the search and the seizure was improper, and suppress all of the evidence obtained by the State.

THE COURT: Thank you, Mr. Mills.

MR. MILLS: Yes, sir.

THE COURT: All right. The court will deny the Motion to Suppress. The following order is dictated in open court for the convenience of the Court, for the assistance of the Court Reporter, and the Court preparing a final order.

The Court reserves the right to add, modify, or delete findings of fact in the Court's discretion until such time as the final order is executed and filed in this mattered. [sic]

What was the date of this stop, guys?

MR. MILLS: April 29, 2009, Your Honor.

THE COURT: Thank you. Find as a fact the defendant was present along with counsel, Mr. Mills, Surry County Bar. Mr. Mills?

MR. MILLS: Yes, sir.

THE COURT: State was represented by Mr. Tim [54] Watson, Assistant District Attorney, Judicial District 17-B.

MR. YEATTS: 17-B.

THE COURT: 17-B. The Court finds that a, this matter comes on pursuant to a Motion to Suppress filed March 3, 2000 [sic] – pursuant to a Motion to Suppress executed by Defendant's counsel on the 21st day of January, 2010, and amendment to the Motion to Suppress filed March 3, 2010.

Next number, Sgt. Matt Darisse, of the Surry County Sheriff's Department, was working criminal interdiction on Interstate 77 on April 9, 2009 at approximately 8:00 a.m.

The Court finds that Sgt. Darisse is a law enforcement officer with 20 years experience.

Next finding of fact, Sgt. Darisse while observing northbound traffic on I-77 observed a vehicle pass him. The driver of this vehicle appeared to the officer to be nervous – strike that – appeared to be stiff and nervous. Find as – The officer then pulled his vehicle

onto I-77 and began following the subject vehicle. The subject vehicle slowed for a slower vehicle in its lane of travel. Sgt. Darisse observed the subject vehicle's right brake light to be, to be out. Sgt. Darisse observed [55] the right brake light of the vehicle to not function as the left brake light of the vehicle came on as the subject vehicle slowed for the slower traffic in its, its lane of travel. Sgt. Darisse, upon making this observation, activated his blue light and instigated a stop of the subject vehicle.

The Court finds further that the, by observation of the video, Sgt. Darisse's patrol car, which began at the time of the instigation of the stop, that the subject's vehicle right brake light was not functioning.

The Court finds that when the vehicle came, was coming to a complete stop on the shoulder of the road that the right brake light then worked immediately prior to the vehicle being turned off, and all lights disengaged.

The Court finds, next finding of fact, Sgt. Darisse, upon instigating his blue lights observed a head pop up out of the back seat of the subject vehicle and then disappear.

Next, Officer Darisse, upon approaching the vehicle, observed the defendant lying in the back seat of the vehicle. And the Court finds from the evidence of Defendant's Exhibit 1 that he was lying underneath a blanket. [56]

Next, the Court finds that the – strike that. Finds from the video –

And at the beginning let's put: The Court makes the following findings. At the beginning of the order if

we could put the following paragraph: Court makes the following findings of fact by greater weight of the evidence, based upon the sworn testimony rendered in open court and the admitted exhibit.

Now going back to the body of the order, the Court finds that Sgt. Darisse observed the defendant lying in the back seat underneath a blanket. Sgt. Darisse then asked the driver of the vehicle – strike that. Sgt. Darisse informed the driver of the vehicle that he was being stopped for a non-functioning brake light, and asked the driver of the vehicle to step out to the rear of the vehicle. The driver complied. Sgt. Darisse engaged in a brief conversation with the driver, asking the driver – the Court here paraphrasing – if anything was wrong with the person in the back seat, and the destination, where the driver – strike that – where the subject vehicle began its travels and its ultimate destination. The driver was then informed that the officer intended to issue him a warning citation so long as the registration on the vehicle checked, came back valid, [57] as well as the driver's license. Officer Darisse took the driver's license, returned to his vehicle – or Sgt. Darisse, Sgt. Darisse believed – Sgt. Darisse formed the opinion that the driver appeared nervous to him as he did not make – as he made poor eye contact and he was continuously placing his hair in a ponytail and then removing his hair from a ponytail. Defendant continued to lie in the back of the vehicle, and did so throughout the entire stop until he was later approached by Sgt. Darisse.

Next finding of fact, Officer Darisse – strike that. Officer Ward arrived at the scene of the stop. Officer Ward was informed by Sgt. Darisse that there was a subject lying in the back of the vehicle underneath a

blanket. Officer Ward then went to the vehicle and asked defendant for his driver's license in order that they might check for outstanding warrants and to determine his identity. The defendant complied and gave his driver's license to Officer Ward without getting up from his position of lying down in the back seat.

Next, the driver continued to stand between Sgt. Darisse's patrol car and the subject car as Officer Ward asked for the defendant's driver's license. [58]

The Court finds that the interaction between Officer Ward and the defendant occurred in approximately one to two minutes.

The Court finds that the stop of the subject vehicle was initiated at approximately 7:55 and 40 – 7:55 and 40 seconds a.m. on this date.

Find as a fact that Sgt. Darisse then re-approached the driver and returned to the driver his driver's license and any other identifying documents he had received from the driver, and gave the driver a warning citation. Sgt. Darisse then asked the driver if he would be willing to answer some questions. The driver indicated and stated that he would answer questions.

The Court finds that Sgt. Darisse's tone and manner with the driver of the vehicle was conversational, non-confrontational and polite.

The Court finds that the driver denied any type of contraband in the car.

The Court finds that the driver denied guns or large sums of cash in the car.

The Court finds that this conversation occurred within a period of a minute or so – the period of a minute to two minutes. The Court finds that Sgt. Darisse then asked for permission to search [59] the vehicle, and that the driver did not object to searching the vehicle, but informed the Sergeant that the vehicle was the defendant's, and that he should make that request of the defendant – and that the Sergeant should make the request of the defendant. The Sergeant then approached the defendant – Sgt. Darisse approached the defendant, who was still lying in the back of the vehicle, and asked for permission to search the vehicle. The defendant informed the Sergeant that he had no objection to the vehicle being searched, although they would have a problem because it was messy, the inside of the vehicle was messy.

The Court finds that the defendant's – that the tone and manner of Sgt. Darisse when asking for permission to search the vehicle with the defendant was conversational, non-confrontational and polite.

The Court further finds that prior to Officer Darisse returning the driver's license to the driver and issuing the citation, the warning citation to the driver, that Officer Ward had returned the defendant's driver's license to him.

These are out of order, Madam Reporter. I may have to move these around. But additional findings of fact that the Court wishes to place in the order: That the driver informed Officer Ward earlier [60] at the side of the car that the driver was tired, which is the reason he was lying down.

The Court finds that the defendant gave his consent to search at approximately 7:08 a.m. (sic).

The Court finds that from the time the blue lights were initiated until the time the defendant gave his consent to search his vehicle approximately 13 minutes had elapsed.

The Court finds that the defendant being asked for his driver's license where the driver was stopped – where the driver was seized lawfully for a taillight being out, and the defendant was lying in the back seat of a vehicle covered by a blanket, and did not make any attempt to bring himself to an upright position during the entire vehicle stop, that the officer's asking the defendant for his driver's license to determine his identity and any outstanding warrants under these facts is an intrusion so slight upon the defendant's liberty when compared with and justified by the need of officer safety, that it does not render events which occurred subsequent unconstitutional – that does not render anything that occurred subsequent to asking for the defendant's driver's license unconstitutional.

The Court further finds that the driver, [61] after receiving his driver's license, identifying information and warning ticket, voluntarily extended the period of detention by consentually [sic] – by consent as he agreed to answer questions of the officer, of Sgt. Darisse.

The Court finds that the defendant voluntarily extended the period of detention by consentually [sic] agreeing to a search of his vehicle by Sgt. Darisse.

The Court finds that the – the Court makes the following conclusions of law based upon the above findings of fact:

The initial stop of the subject vehicle was constitutional, as Sgt. Darisse had a reasonable and articulable suspicion that the subject vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light.

The Court concludes that the length of the detention prior to the driver and the defendant consentually [sic] agreeing to extend the detention was tailored to the – the Court concludes was tailored – the amount of time of the stop from the seizure of the vehicle until such time as the driver voluntarily extended the extension the Court concludes was [62] reasonable and was tailored to the issuance of a warning citation to the defendant for failure to maintain properly working brake lights.

The Court concludes that the driver, that the encounter between Sgt. Darisse, Officer Ward, the defendant and the driver became a consentual [sic] encounter at the time the driver voluntarily agreed to answer questions, after having all of his information returned to him by Sgt. Darisse.

The Court finds that the defendant consentually [sic] extended the encounter further and gave consent – gave voluntary consent to allow his vehicle to be searched upon questioning by the officers upon a request made by Sgt. Darisse.

The Court concludes there is no evidence in the court that the Court finds from the totality of the circumstances, and concludes that a reasonable person would have believed they were free to go without giving consent to further answer questions.

The Court concludes as a matter of law that there was no evidence that the actions of the officer by overbearing the will of the defendant or the driver procured consent to extend the encounter or the search of the vehicle. The Court concludes that the seizure of the driver was constitutionally valid, and that the [63] search of the vehicle was constitutionally valid. A Motion to Suppress is denied.

And again the Court reiterates and Court reserves the right to add, modify or delete findings of fact or conclusions of law until the order is executed and filed.

Okay, guys, I appreciate y'all's help. I appreciate everybody being so well prepared in helping me with this case. Thank you so much.

MR. MILLS: Thank you for hearing us, Your Honor.

THE COURT: Yes, sir.

(WHEREUPON: These proceedings were concluded at 12:30 p.m.)

* * * *

PETITIONER'S BRIEF

No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari
to the North Carolina Supreme Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.

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BRIEF FOR PETITIONER

Petitioner Nicholas Brady Heien respectfully requests that this Court reverse the judgment of the North Carolina Supreme Court.

OPINIONS BELOW

The relevant opinion of the Supreme Court of North Carolina (Pet. App. 1a) is published at 737 S.E.2d 351. The relevant opinion of the Court of Appeals of North Carolina (Pet. App. 29a) is published at 714 S.E.2d 827. A subsequent opinion of the North Carolina Court of Appeals (Pet. App. 42a) is published at 741 S.E.2d 1, and an order from the North Carolina Supreme Court affirming that judgment (Pet. App. 41a) is published at 749 S.E.2d 278.

JURISDICTION

The final judgment of the North Carolina Supreme Court was entered on November 8, 2013. Pet. App. 41a. An interlocutory decision from the North Carolina Supreme Court, resolving the federal question presented here, was issued in 2012. Pet. App. 1a-28a. This Court granted certiorari on April 21, 2014. 134 S. Ct. 1872 (2014). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

The Fourth Amendment permits police officers to stop a motor vehicle and its occupants for law enforcement purposes only when there is at least reasonable suspicion that a law has been violated. This case presents the question whether an officer's misinterpretation of the traffic code can form the basis for reasonable suspicion. A bare majority of the North Carolina Supreme Court held that it can.

1. Early one morning in 2009, petitioner Nicholas Heien and Maynor Javier Vasquez were traveling along Interstate 77 through Surry County, North Carolina. Vasquez was driving petitioner's car while petitioner slept in the back seat. Pet. App. 29a-30a.

While observing traffic on the interstate in order to "look[] for criminal indicators of drivers [and] passengers," J.A. 26, Officer Matt Darisse of the Surry County Sheriff's Department noticed Vasquez drive by, Pet. App. 29a. The officer thought Vasquez appeared "stiff and nervous," insofar as he was "gripping the steering wheel at a 10 and 2 position, looking straight ahead." J.A. 15. The officer pulled onto the highway and began following petitioner's vehicle. Pet. App. 29a.

As petitioner's car approached a slower-moving vehicle, Officer Darisse observed that the car's left brake light was properly functioning, but that the right rear brake light failed to illuminate. North Carolina requires all vehicles merely to have "*a* stop lamp," N.C. Gen. Stat. § 20-129(g) (emphasis added), and no North Carolina appellate court had ever

construed this statute to require two working lights.[1] Officer Darisse nevertheless activated his blue lights and stopped petitioner's vehicle. Pet. App. 29a. Another officer arrived later to assist. *Id.* 30a.

Officer Darisse informed Vasquez and petitioner that he had stopped them "for a nonfunctioning brake light." Pet. App. 2a. He then told Vasquez to step out of the car and asked Vasquez some questions about where he and petitioner were going. Meanwhile, the other officer walked to the back seat window and asked petitioner similar questions, which he answered differently from Vasquez. Officer Darisse also ran checks on Vasquez's driver's license and petitioner's registration, and issued Vasquez a warning citation for the brake light. *Id.* 2a-3a.

After issuing the warning, Officer Darisse asked Vasquez for permission to search the vehicle. Vasquez demurred, explaining that the car belonged to petitioner. The officer then asked petitioner if he would "mind if we made a quick check to make sure you don't have any drugs or guns or anything like that" in the car. Def. Ex. 1 (video of the stop taken from dashboard of police cruiser) at 11:50. Petitioner

---

[1] The subsection of the statute reads in full: "No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps." N.C. Gen. Stat. § 20-129(g).

responded that he "d[id]n't really care." *Id.* at 12:03. The officer then told him to "step on out" of the car and directed him over to the shoulder of the highway. *Id.* at 12:15. The officers rummaged through the car for about forty minutes and found a plastic sandwich baggie containing cocaine.

2. The State charged petitioner with trafficking cocaine. (The State also charged Vasquez, and he pleaded guilty to attempted cocaine trafficking.) Petitioner responded by filing a motion to suppress the evidence that the officers had discovered during the search of his car. Petitioner argued that the traffic stop violated the Fourth Amendment because Officer Darisse lacked "reasonable articulable suspicion that criminal activity had been committed or was being committed, or that a motor vehicle traffic offense or infraction had occurred." Am. Mot. to Suppress at 1. Petitioner also contended that his subsequent consent to the search was invalid. The trial court denied petitioner's motion.

In light of that ruling, petitioner pleaded guilty to two variations of drug trafficking, reserving the right to appeal the denial of his motion to suppress. Pet. App. 31a. Petitioner was sentenced to two consecutive prison terms of ten to twelve months.

3. On appeal, the North Carolina Court of Appeals reversed. Emphasizing the singular article and noun in the statutory phrase "a stop lamp," the court first determined that North Carolina law requires only one working brake light. Pet. App. 34a (citing N.C. Gen. Stat. § 20-129(g)). Because petitioner's vehicle had a working brake light, it was in compliance with that law. The court of appeals then held that the stop violated the Fourth

Amendment, explaining that "an officer's mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable justification for a traffic stop." Pet. App. 32a.

Having concluded that the stop was invalid, the court of appeals next held that the evidence the officers obtained from that stop had to be suppressed. In federal court and other courts recognizing the "good-faith" exception to the exclusionary rule, police officers' mistakes of law sometimes counsel against suppression. *See, e.g., United States v. Leon*, 468 U.S. 897 (1984). But the North Carolina Constitution, like many other state constitutions, forecloses any such good-faith exception. *See State v. Carter*, 370 S.E.2d 553, 562 (N.C. 1988); Pet. 13 n.5. Accordingly, the State did not argue, and the North Carolina Court of Appeals did not consider, whether the good-faith exception would apply in this situation.

4. The North Carolina Supreme Court granted discretionary review, and by a 4-3 vote reversed. The State did not dispute, and the North Carolina Supreme Court therefore assumed, that North Carolina law requires only one working brake light. *See* Pet. App. 7a. The court consequently turned directly to the Fourth Amendment issue.

The North Carolina Supreme Court began that analysis by observing that "[v]arious federal and state courts have provided different answers" to the question "whether a stop is permissible when an officer witnesses what he reasonably, though mistakenly, believes to be a traffic violation." Pet. App. 8a-9a. The North Carolina Supreme Court adopted the minority view on the issue, holding that

"so long as an officer's mistake is reasonable, it may give rise to reasonable suspicion." *Id.* 18a. The court rested that holding primarily on the view that "the primary command of the Fourth Amendment" is that "law enforcement agents act reasonably." *Id.* 13a. Because officers comply with that directive when they make reasonable mistakes of fact, the North Carolina Supreme Court surmised, "the Fourth Amendment would seem not to be violated" when they make reasonable mistakes of law. *Id.* 13a, 18a. Finally, the court noted that "because we are particularly concerned for maintaining safe roadways, we do not want to discourage our police officers from conducting [traffic] stops for perceived traffic violations," even when no such violations have occurred. *Id.* 14a.

The North Carolina Supreme Court further held that Officer Darisse's mistake was "reasonable." The court explained that even though the subsection of the traffic code dealing specifically with stop lamps speaks only in the singular, another subsection requires motor vehicles to "have all originally equipped *rear* lamps or the equivalent in good working order." Pet. App. 18a-19a (emphasis added) (quoting N.C. Gen. Stat. § 20-129(d)). In light of these varying directives with respect to "stop lamps" and "rear lamps," the court concluded that Officer Darisse "could have reasonably believed that he witnessed a violation of [North Carolina law]." Pet. App. 19a. Accordingly, the North Carolina Supreme Court reversed the judgment of the North Carolina Court of Appeals, and remanded for further proceedings as to whether petitioner's consent to search his car was valid. *Id.* 19a-20a.

Three justices dissented and argued that the court should have followed the majority of courts in holding that "an officer's mistake of law cannot be the basis for reasonable suspicion." Pet. App. 24a. The dissenters disagreed with the approach taken by their colleagues on the ground that the permissibility of investigatory searches and seizures turns simply on "whether the rule of [state] law as applied to the established facts *is or is not violated*." *Id.* 23a (quoting *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996)) (internal quotation marks omitted). "There is no room for reasonable mistakes of law under the *Ornelas* articulation of the rule; either the law was violated and the stop is reasonable, or the law was not violated and the stop is not reasonable." Pet. App. 23a. Quoting an Eleventh Circuit decision on the issue, the dissent also stressed "the fundamental unfairness of holding citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it." *Id.* 28a (quoting *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003)) (internal quotation marks omitted).

5. On remand, the North Carolina Court of Appeals rejected petitioner's challenge to the validity of his consent. Pet. App. 42a-61a. The North Carolina Supreme Court did as well, thus upholding petitioner's conviction and sentence. *Id.* 41a.

6. This Court granted certiorari. 134 S. Ct. 1872 (2014).

SUMMARY OF ARGUMENT

The traffic stop of petitioner's car, based solely on the police officer's misinterpretation of local traffic law, violated the Fourth Amendment.

I. This Court has long held that a traffic stop is valid under the Fourth Amendment only if officers have objectively reasonable suspicion to believe that a law is being violated. That objective inquiry can be properly performed only by measuring the facts against the correct interpretation of the law. Otherwise, the reasonable suspicion doctrine would be at odds with various common-law principles, including the ancient maxim that ignorance of the criminal law is no excuse. Allowing traffic stops based on "reasonable" mistakes of law also would be in tension with multiple canons of statutory construction that aim to prevent the government from benefitting from ambiguity in criminal statutes. Finally, such a rule would subvert the Fourth Amendment's core purpose of constraining officer discretion, for it would confer upon the police the authority to seize motorists when the facts known to the officers, measured against the accurate view of the law, reveal only wholly innocent conduct.

To be sure, the Fourth Amendment tolerates traffic stops based on reasonable mistakes of *fact*. But the reasons for doing so do not carry over to mistakes officers make about applicable law. The Fourth Amendment affords officers leeway to make good-faith mistakes of fact because officers need flexibility to make quick, ad hoc factual assessments in the field – and they are expert in doing so. The law, by contrast, lends itself to careful, ex ante

analysis. And courts evaluating the legality of traffic stops have already shown that they can easily distinguish mistakes of law from those of fact.

II. The reasonableness of an officer's mistake of law can sometimes be relevant to the remedy for a Fourth Amendment violation. In a long line of cases beginning with *Illinois v. Krull*, 480 U.S. 340 (1987), and including *Davis v. United States*, 131 S. Ct. 2419 (2011), this Court has held that evidence should not be suppressed when officers conduct a search or seizure based on certain types of reasonable mistakes of law. This Court likewise has held in cases involving the Fourth Amendment that qualified immunity protects officers from tort liability when they make reasonable mistakes of law.

But in all of these cases, this Court has held or assumed that mistakes of law – as opposed to mistakes of fact – necessarily render officers' searches and seizures violative of the Fourth Amendment. And for several reasons, it is critical that this Court continue to restrict the relevance of the reasonableness of mistakes of law to the question of remedy.

First, holding that such reasonableness is relevant to whether the Fourth Amendment is violated would require courts to embark on the difficult task of determining which types of mistakes of law affect rights and which affect only remedies. Second, importing inquiries about the reasonableness of mistakes of law into the rights stage would preclude courts from considering important evidence relevant to such determinations – such as police customs, training manuals, and

court decisions. While this Court's precedent accepts the validity of such reference points at the remedy stage, it renders them off-limits at the rights stage because they would generate unacceptable variation in what the Fourth Amendment means.

Third, confining the relevance of an officer's mistake of law to the remedy stage safeguards respect for the rule of law. Even in instances where there may be no remedy for equitable reasons, legal clarity that the Fourth Amendment has nonetheless been violated is important in making a system of individual rights effective.

III. Even if this Court were to deem the equitable considerations now pertinent only to remedies suddenly relevant to the meaning of the Fourth Amendment itself, the reasonableness of a misinterpretation of the traffic code would still not render a traffic stop valid. In contrast to situations where police officers' mistakes of law arise from reasonably relying on assurances from courts or legislatures, the officer's mistake here derived from his own overly aggressive interpretation of the law. Only by refusing to excuse such mistakes can officers be properly deterred from engaging in such overly ambitious readings of the traffic code, at the expense of individual liberty.

Other law enforcement incentives also would be skewed if stops based on officer mistakes of traffic law were upheld as proper. Most notably, police departments would be discouraged from using resources at their disposal to ensure that officers on patrol have an accurate understanding of the law. Police departments would also be discouraged from

asking lawmakers to clarify ambiguous laws, for such clarifications would shrink officer discretion.

Indeed, if motorists were subject to seizures based on mistaken interpretations of arguably imprecise laws, it also would be much more difficult – indeed, sometimes downright impossible – for people to avoid being exposed to traffic stops. Whatever the precise definition of "reasonable" in this context, the realm of reasonable interpretations of language in traffic codes across the country is surely much broader than the realm of correct interpretations. And to the extent the North Carolina Supreme Court's holding would allow stops based on reasonable mistakes as to the *existence* of laws, the universe of circumstances allowing officers to impose upon citizens the burdens of traffic stops would be broader still.

The safety objectives of traffic laws do not make police misinterpretations of such laws more tolerable, much less – as the North Carolina Supreme Court suggested (Pet. App. 14a) – desirable. In North Carolina, as elsewhere, it is the legislature's job to decide what traffic activities should be prohibited because they are unsafe. It is the responsibility of law enforcement to learn and enforce those laws. The Fourth Amendment does not allow the police to reinterpret and broaden those laws according to officers' own perceptions of what is necessary to protect public safety.

ARGUMENT

I. "Reasonable Suspicion" Must Be Measured Against The Correct Interpretation Of The Law.

As the Tenth Circuit has explained, the relevant question in a case such as this is: "Against what interpretation of the law should [a court] assess the facts when deciding whether there was reasonable suspicion . . . to make a traffic stop?" *United States v. Nicholson*, 721 F.3d 1236, 1244 (10th Cir. 2013). Should a court assess the facts against the "correct interpretation of the law" or against whatever misinterpretation of the law an officer might reasonably have? *Id.* For the reasons that follow, the reasonable suspicion inquiry requires courts to measure the facts against the correct interpretation of the law.

A. Fourth Amendment Precedent, Tradition, And Purpose Require The Facts Known To The Officer To Be Measured Against The Correct Interpretation Of The Law.

1. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "[S]topping an automobile and detaining its occupants constitute a 'seizure'" within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Accordingly, stopping an automobile and detaining the driver "are unreasonable under the Fourth Amendment" unless the police have "at least articulable and reasonable suspicion." *Id.* at 663; *see also Ornelas v. United*

States, 517 U.S. 690, 693 (1996) ("An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion.").

This Court's precedent dictates that reasonable suspicion is an objective test. As this Court has put it, the test requires an officer to have "'a particularized and objective basis' for suspecting the person stopped of criminal activity." *Ornelas*, 517 U.S. at 696 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). In *Whren v. United States*, 517 U.S. 806 (1996), this Court unanimously reaffirmed the need for objectivity in assessing the reasonableness of a traffic stop, holding that an officer's subjective reason for conducting a traffic stop is irrelevant to its legality. *Id.* at 813.

In light of the objective nature of the reasonable suspicion standard, this Court has indicated that assessing reasonable suspicion involves a two-step inquiry. "The first part of the analysis involves only a determination of historical facts." *Ornelas*, 517 U.S. at 696. Next, a court must evaluate "whether the rule of law as applied to the established facts is or is not violated." *Id.* at 697 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1983)) (internal quotation marks omitted). In other words, the critical question is whether the facts give rise to sufficient reason to believe "that a driver *is violating*" an applicable traffic regulation. *Whren*, 517 U.S. at 817 (emphasis added) (quoting *Prouse*, 440 U.S. at 661).

The only sensible way to perform this inquiry is to measure individualized suspicion "against the correct interpretation of the law, as opposed to any other interpretation, even if arguably a reasonable

one," *Nicholson*, 721 F.3d at 1244. The "essential purpose" of the reasonable suspicion standard, after all, is to constrain "the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Prouse*, 440 U.S. at 653-54 (citations and internal quotation marks omitted). It is arbitrary for officers to effectuate traffic stops when neither the facts known to them, nor any reasonable inferences, indicate anything other than wholly innocent conduct. Even when officers misinterpret the law entirely in good faith, a seizure on that basis is still indiscriminate insofar as it lacks any objective legal justification.

2. Tradition likewise supports evaluating reasonable suspicion with reference to the correct interpretation of traffic law. This Court has repeatedly recognized that post-Founding common law cases can reveal constitutional principles, for the common law generally developed in harmony with such principles. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321-24 (2009) (inferring constitutional meaning from late nineteenth-century and early twentieth-century state-law cases); *Atwater v. City of Lago Vista*, 532 U.S. 318, 342-43 (2001) (same).

Under the common law, "[n]o right is held more sacred, or is more carefully guarded than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, *unless by clear and unquestionable authority of law.*" *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (emphasis added) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891))

(internal quotation marks omitted). Thus, although the common law has long protected an officer from tort liability "in every case where he act[ed] under a reasonable mistake as to the existence of *facts*," Restatement of Torts § 121 cmt. i (1934) (emphasis added), the common law has always presumed that officers know the law, and has held them liable in trespass whenever they make warrantless arrests based on incorrect interpretations of statutes.

As the first Restatement of Torts memorialized the rule: "[A]n officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a *mistake of law reasonable in one of his position*, believes to be a common law felony." Restatement of Torts § 121 cmt. i (1934) (emphasis added); *see also* Restatement (Second) of Torts § 121 cmt. i (1965) (reaffirming this rule). Indeed, the Restatement addressed the precise form of mistake at issue here, expressly foreclosing any exception for mistakes of law based on an ambiguous "statute . [that] is not judicially construed [contrary to the officer's view] until after the arrest is made." Restatement of Torts § 121 cmt. i; *see also id.* ("No protection is given to a peace officer who, however reasonably, acts under a mistake of law" of this type).

The Michigan Supreme Court's decision in *Malcomson v. Scott*, 23 N.W 166 (Mich. 1885), illustrates this rule. There, an officer arrested the plaintiff on facts that did not constitute the charged crimes of larceny or embezzlement. The court held the arrest invalid, explaining that "[a]n officer of justice is bound to know what the law is, and if the facts on which he proceeds, if true, would not justify

action under the law, he is a wrong-doer." *Id.* at 168. As that court continued: "[V]iolations of law by those who are appointed to protect instead of destroy private security, deserve no favor." *Id.*

English common law developed based on the same presumption. In *Carratt v. Morley*, (1841) 113 Eng. Rep. 1036, for instance, an arresting officer was held liable for false imprisonment based on his mistake of law when there was no jurisdiction to make the arrest. A treatise summarized the rule this way: If "the Court has no jurisdiction over the cause before it, the whole proceeding is bad, and any one who enforces the process of the Court therein will be liable to an action for false imprisonment; *for he is presumed to know the law* and therefore to be cognisant of the want of jurisdiction." 1 W. Blake Odgers & Walter Blake Odgers, The Common Law of England 481 (2d ed. 1920) (emphasis added) (footnote omitted). Though there was possibly an exception to this rule for officers acting under the direction of a magisterial warrant, officers were entitled to no protection from liability when acting on their own. *Id.* at 481-82.

3. Measuring facts against the correct interpretation of the law maintains the proper relationship between citizens and their government, as reflected in several doctrinal precepts.

First and foremost, *Whren*'s anti-subjectivity rule gives officers "broad leeway" to conduct traffic stops regardless of whether their subjective intent corresponds to the legal justifications for their actions. *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998). "But the flip side of that leeway is that the legal justification must be objectively

grounded" in a correct interpretation of the law. *Id.* In other words, if officers can detain a motorist for any traffic violation, no matter how small and regardless of their subjective motives, they should not be able to detain a motorist when the observed facts, measured against the correct interpretation of the law, reveal only wholly innocent conduct.

Evaluating the legality of police officers' actions against the correct interpretation of the law also is consistent with the standard to which ordinary citizens are held. "[T]he background presumption" – fundamental to the administration of criminal law – is that "every citizen knows the law." *Bryan v. United States*, 524 U.S. 184, 193 (1998). Accordingly, "the traditional rule" is that "ignorance of the law is no excuse." *Id.* at 196. As Justice Holmes famously explained, "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey." Oliver W. Holmes, Jr., The Common Law 48 (1881).[2]

It takes little reflection to see the "fundamental unfairness" of holding citizens to that maxim "while

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[2] This concept is as deeply entrenched in North Carolina as anywhere else. As the North Carolina Supreme Court recognized long ago, "'Ignorance of the law excuses no one.' This may be sometimes a hard rule, but, without it, society, as we have it organized, would go to pieces. 'It lies at the foundation of the administration of justice. And there is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced in every trial by conflicting evidence upon the question of ignorance.'" *State v. McLean*, 28 S.E. 140, 143 (N.C. 1897) (quoting *State v. Boyett*, 32 N.C. (10 Ired.) 336, 343 (1849)).

allowing those entrusted to enforce the law to be ignorant of it." *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (internal quotation marks omitted). Indeed, when a police officer drives as a citizen, he can be held accountable for any violations of the traffic code, no matter how reasonable any mistake he might make may turn out to be. It would be counterintuitive, to say the least, to presume that an officer knows the law in his capacity as a citizen, but to abandon that presumption when he acts to enforce the law. Put in more absolute terms, "failure to understand the law by the very person charged with enforcing it is *not* objectively reasonable." *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005).

Finally, various canons of statutory construction reinforce the principle that the government should not benefit from mistaken interpretations of ambiguous or otherwise confusing criminal laws. Under the "venerable rule" of lenity, *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (opinion of Souter, J.), "penal laws are to be construed strictly" in order to prevent the government from restraining individual liberty absent clear authority to do so, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Thus, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)) (internal quotation marks omitted). And if a criminal statute

is so indeterminate that "men of common intelligence must necessarily guess at its meaning," the law is constitutionally void for vagueness. *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

The same canons apply to state statutes. In North Carolina, for example, "any statute enacted in the exercise of the police power must be strictly construed so as to result in the least interference with personal liberty." *In re Appeal from Denial of Application to Dredge and/or Fill of Broad and Gales Creek Cmty. Ass'n*, 261 S.E.2d 510, 512 (N.C. Ct. App. 1980) (citing 3 Strong's N.C. Index 3d, Constitutional Law §§ 11, 11.1 (1976)), *rev'd on other grounds*, 266 S.E.2d 645 (N.C. 1980). And, of course, the void-for-vagueness doctrine applies equally to state laws. *See, e.g.*, *Giaccio v. Pennsylvania*, 382 U.S. 399, 404-05 (1966).

The North Carolina Supreme Court's holding that a police officer may act upon an unduly expansive interpretation of law, "yet still act reasonably under the circumstances," Pet. App. 13a, is at odds with these principles of construction. To the extent a traffic statute is ambiguous, the government's power to restrain individual liberty should shrink, not expand.

B. There Is No Basis For Treating Mistakes Of Law The Same As Mistakes Of Fact.

The North Carolina Supreme Court resisted measuring reasonable suspicion against the correct interpretation of the law partly so that it could treat mistakes of law "the same" as mistakes of fact, which the Fourth Amendment tolerates so long as the

mistakes are objectively reasonable. Pet. App. 18a. But there is nothing improper or undesirable about treating mistakes of law differently than mistakes of fact. To the contrary, the traditional legal reasons for treating such errors as distinct apply in the context of the Fourth Amendment as much as anywhere else.

1. The reasons for condoning mistakes of fact under the reasonable suspicion standard do not carry over to mistakes of law. The Fourth Amendment affords officers flexibility when it comes to facts because they need to make quick, ad hoc assessments and are better positioned than courts to make those judgments. As this Court has explained, "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). This is why "what is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable." *Rodriguez*, 497 U.S. at 185-86; *see also Hill v. California*, 401 U.S. 797, 804 (1971) (arrest based on mistake of fact was valid because officers' actions were "a reasonable response to the situation facing them at the time"). And reasonableness in this respect is informed not only by historical facts known to officers but also by inferences and deductions that officers are "trained" to draw – "inferences and deductions that might well elude an untrained person." *United States v. Cortez*, 449 U.S. 411, 418 (1981).

But legal determinations are different. In contrast to factual inferences, legal analysis is not something that officers must do on the fly or that officers are better trained than courts to undertake. A traffic law, "unlike the case-by-case factual possibilities entailed in probable cause and reasonable suspicion assessments, has an ex ante epistemic baseline." Wayne A. Logan, *Police Mistakes of Law*, 61 Emory L.J. 69, 86 (2011) (footnote omitted). Here, for instance, the North Carolina General Statutes either require one working brake light or they require all such lights to be operational. Nothing an officer might suddenly confront in the field could affect that purely legal question.

The North Carolina Supreme Court objected that reasonable suspicion is a "commonsense, non-technical conception[] 'on which reasonable and prudent men, not legal technicians, act.'" Pet. App. 16a (quoting *Ornelas*, 517 U.S. at 695 (quoting in turn *Illinois v. Gates*, 462 U.S. 213, 231 (1983))). But this quotation speaks only to "the factual and practical considerations" that go into a reasonable-suspicion determination. Pet. App. 16a. When it comes to legal assessments, ordinary people are not legal technicians either, and they are held responsible for the law as correctly interpreted. Thus, just as courts have long distinguished between criminal defendants' mistakes of fact and law and held them accountable for the latter, *see Reynolds v. United States*, 98 U.S. 145, 167 (1878), so should they maintain this distinction when evaluating law enforcement's claims of reasonable suspicion.

2. Nor is there any need to consider mistakes of fact and law together simply because of feasibility concerns. The North Carolina Supreme Court asserted that "it is not always clear whether a mistake is one of fact or of law." Pet. App. 18a. But courts evaluating the legality of traffic stops have already shown themselves easily able to maintain their usual practice of considering mistakes of law and fact separately. *See, e.g.*, *United States v. Martin*, 411 F.3d 998, 1000-01 (8th Cir. 2005) (distinguishing the question of fact whether the right brake light was broken from the question of law whether the applicable motor vehicle code required two working brake lights); *Chanthasouxat*, 342 F.3d at 1272, 1274 (distinguishing question of fact whether van had inside rear-view mirror from question whether local law required vehicles to have inside rear-view mirror). The North Carolina courts likewise easily distinguished between the two in this case. Pet. App. 8a-9a.

The only case the North Carolina Supreme Court cited to suggest any difficulty distinguishing law and fact in this context was *United States v. Miguel*, 368 F.3d 1150 (9th Cir. 2004). Yet, in that case, the Ninth Circuit had no trouble differentiating between the two. The officers correctly understood the traffic law at issue to prohibit driving an unregistered vehicle. But they nevertheless stopped the defendant's car, "rel[ying] on inaccurate information in a computer database" indicating that the registration had expired. *Id.* at 1154. Hence, the court easily concluded that the officers' "mistake was one of fact" and thus did not taint the stop. *Id.*

II. The Reasonableness Of A Mistake Of Law Is Relevant Only To The Issue Of Remedy.

The rule that the Fourth Amendment measures the legality of searches and seizures against the correct interpretations of the law does not necessarily mean that courts must completely blind themselves to the reasonableness of mistakes that officers make in this respect. At least with respect to certain types of mistakes of law, the reasonableness of a police officer's mistake of law is relevant to the remedy for a Fourth Amendment violation. But its relevance is strictly limited to that inquiry.

A. This Court's Precedent Restricts The Relevance Of Good-Faith Mistakes Of Law To The Issue Of Remedy.

This Court's Fourth Amendment jurisprudence vigilantly distinguishes between rights and remedies – confining the relevance of the reasonableness of any mistake of law only to the latter sphere. There is no reason to muddy that distinction here.

1. This Court has stressed time and again that the question whether an officer violates the Fourth Amendment and the question whether, if so, the evidence obtained should be suppressed are "separate, analytically distinct issue[s]." *Davis v. United States*, 131 S. Ct. 2419, 2431 (2011); *see also Illinois v. Gates*, 462 U.S. 213, 223 (1983) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.").

In *United States v. Leon*, 468 U.S. 897 (1984), this Court held that when officers act "in objectively reasonable reliance on a subsequently invalidated search warrant," the evidence they obtain should not be suppressed. *Id.* at 922. At the same time, this Court explained that courts should address this "good-faith issue" separately from "the Fourth Amendment question," and that "[t]he good-faith exception is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment." *Id.* at 924-25; *see also id.* at 923 (good-faith exception "leave[s] untouched the probable-cause standard"). In other words, the fact that an officer reasonably relies on a magistrate's issuance of an illegitimate warrant does not render the officer's conduct consistent with the Fourth Amendment; it merely means that the evidence obtained should not be suppressed.

2. The North Carolina Supreme Court broke from this framework here. Emphasizing that "the primary command of the Fourth Amendment [is] that law enforcement agents act reasonably," the court reasoned that when "[an] officer's mistake of law is objectively reasonable, the Fourth Amendment would seem not to be violated." Pet. App. 13a. However tidy this syllogism may appear, it is erroneous. This Court has repeatedly held that the reasonableness of a mistake of law – just like the reasonableness of an officer's reliance on a warrant – is relevant only to the issue of remedy.

In *Illinois v. Krull*, 480 U.S. 340 (1987), for example, the Court declined to require suppression when police officers conducted a search in "reasonable" reliance on a state statute that was later

declared unconstitutional. *Id.* at 357. But despite the officer's good-faith reliance on the statute, the Court still "[a]ssum[ed] the Illinois Supreme Court was correct" when it concluded that the search in question violated the Fourth Amendment. *Id.* at 359. This assumption was consistent with several previous decisions – all of which the Court cited and accepted – where this Court explicitly held that officers violated the Fourth Amendment when conducting searches in reliance on statutes later deemed unconstitutional. *See id.* at 355-57 n.12 (citing *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); and *Berger v. New York*, 388 U.S. 41 (1967)).

Similarly, in *Davis v. United States*, the Court ruled that suppression was inappropriate when officers conducted a search in "objectively reasonable reliance" on binding, but erroneous, appellate precedent. 131 S. Ct. at 2423-24. At the same time, this Court left no doubt that despite the reasonableness of the officer's actions, the search in question "turned out to be unconstitutional." *Id.* at 2428. Therefore, while the reasonableness of an officer's mistake of law can bear on whether to suppress evidence at the remedy stage, the good-faith nature of the officer's mistake cannot render the search or seizure "reasonable" within the meaning of the Fourth Amendment.

This Court's qualified immunity jurisprudence reinforces this point. In that context, this Court has explained that "the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer." *Groh v. Ramirez*, 540

U.S. 551, 565 n.8 (2004) (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)). And this Court has held repeatedly that officers conducting searches or seizures that they "reasonably believe to be lawful" are entitled to immunity from damages. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Yet this Court has never held that such reasonableness means that the Fourth Amendment was not violated.

To the contrary, this Court in *Anderson* started from the premise that the officers "violate[d] the Fourth Amendment." 483 U.S. at 636. It also expressly held in *Wilson v. Layne*, 526 U.S. 603 (1999), that the officers "violated petitioners' Fourth Amendment right[s]" even though "a reasonable officer could have believed" that the search at issue was lawful, *id.* at 614-15; *see also Saucier v. Katz*, 533 U.S. 194, 206 (2001) (while "reasonable, but mistaken, beliefs as to the facts" render searches or seizures consistent with the Fourth Amendment, "reasonable mistakes as to the legality of their actions" entitle officers only to qualified immunity). Thus, contrary to the North Carolina Supreme Court's supposition, there can be no doubt that an officer can make a reasonable mistake of law and still conduct an "unreasonable" search or seizure under the Fourth Amendment.

These qualified immunity cases also make clear that the North Carolina Supreme Court's concern (Pet. App. 16a) that officers should not be expected "to accurately forecast how a reviewing court" will later interpret the law was misplaced. In *Wilson*, this Court acknowledged that the officers there could not have been "expected to predict the future course of constitutional law." 526 U.S. at 617 (quoting

Procunier v. Navarette, 434 U.S. 555, 562 (1978)). Yet this Court had little difficulty unanimously concluding that the reasonableness of the officers' actions did not render their conduct consistent with the Fourth Amendment. *Wilson*, 526 U.S. at 605-06. The legality of officers' actions must be measured against the correct interpretation of the law, regardless of whether that interpretation was readily discernable at the time.

3. The North Carolina Supreme Court ignored all of this precedent, instead contending that its reasoning was "perhaps somewhat supported" by this Court's decision in *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Pet. App. 12a. In *DeFillippo*, this Court granted certiorari "to review the Michigan court's holding that evidence should be suppressed on federal constitutional grounds, although it was obtained as a result of an arrest pursuant to a presumptively valid ordinance" that later turned out to be unconstitutional. 443 U.S. at 35. The Court held that in light of the fact that the officer conducted the arrest at issue in "good-faith reliance on [the] ordinance," the evidence obtained as a result of the arrest "should not have been suppressed." *Id.* at 33, 40. This holding is perfectly consistent with the remedial holdings in *Leon*, *Krull*, and *Davis* – and in no way supports the ruling below that seizures based on reasonable mistakes of law do not even violate the Fourth Amendment.

To be sure, the *DeFillippo* opinion also contains language suggesting that the reasonableness of the officer's mistake of law rendered the arrest itself constitutional. This Court stated at one point, for instance, that "[t]he subsequently determined

invalidity of the Detroit ordinance on vagueness grounds does not undermine the validity of the arrest." 443 U.S. at 40. But this language is a relic of an earlier time, when this Court treated the issue whether to suppress evidence as "synonymous with" the issue whether the Fourth Amendment was violated. *Arizona v. Evans*, 514 U.S. 1, 13 (1995); *see also Davis*, 131 S. Ct. at 2427 (describing the earlier conflation of these two issues).

The true focus of this Court's attention in *DeFillippo* was on the exclusionary rule. Asking whether any "conceivable purpose of deterrence would be served by suppressi[on]," this Court concluded that the officer "should not have been required to anticipate that a court would later hold the ordinance unconstitutional." 443 U.S. at 37-38 & n.3. This Court analogized this reasoning to its earlier decision in *Pierson v. Ray*, 386 U.S. 547 (1967), in which this Court assumed that an arrest was unconstitutional but held that the officers were entitled to qualified immunity because the illegality of the officers' actions was unclear at the time. *See DeFillippo*, 443 U.S. at 38. In short, *DeFillippo* held that the search in question was valid because suppression was inappropriate, not because the reasonableness of the officer's mistake of law somehow rendered the search itself legitimate under the Fourth Amendment. Properly construed against today's landscape, therefore, *DeFillippo* is a case solely about the exclusionary rule, not the meaning of the Fourth Amendment itself.

Lest there be any doubt, this Court has since characterized *DeFillippo* as a case only about suppression. In *Illinois v. Gates*, the Court cited the

case for the proposition that "exclusion [is not] required when law enforcement agents act in good-faith reliance upon a statute or ordinance that is subsequently held to be unconstitutional." 462 U.S. at 256 (White, J., concurring). And in *Leon*, this Court described *DeFillippo* as "not requir[ing] suppression of the fruits of a search incident to an arrest made in good-faith reliance on a substantive criminal statute that subsequently is declared unconstitutional." *Leon*, 468 U.S. at 911-12; *see also id.* at 911 (explaining that *DeFillippo* rel[illegible] on "the purposes underlying the exclusionary rule"). Several federal courts of appeals likewise now treat the subsequent invalidation of a substantive criminal statute that gave rise to an arrest simply as reason to suspend the exclusionary rule.[3] It is too late in the day to reverse course now and recast *DeFillippo* as a case truly about the meaning of the Fourth Amendment itself.

B. It Is Crucial That This Court Continue To Restrict The Relevance Of Good-Faith Mistakes Of Law To The Issue Of Remedy.

This Court should preserve the distinction it has so carefully drawn in recent years between Fourth Amendment rights and remedies, under which good-faith mistakes of law are relevant only to the latter, for three important reasons: (1) the distinction avoids

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[3] *See, e.g.*, *United States v. Cardenas-Alatorre*, 485 F.3d 1111, 1114-17 (10th Cir. 2007); *United States v. Meek*, 366 F.3d 705, 714 (9th Cir. 2004); *United States v. Dexter*, 165 F.3d 1120, 1125 (7th Cir. 1999).

having to make complicated determinations concerning which kinds of mistakes of law are relevant to Fourth Amendment rights themselves and which are relevant only to remedies; (2) the distinction ensures that courts evaluating assertions of good faith can consider all of the evidence relevant to those assertions; and (3) the distinction enables courts to make clear to the populace that police officers, just like ordinary citizens, act unlawfully when they act based on misconceptions of law.

1. The North Carolina Supreme Court's approach would require courts to resolve new and difficult questions in order to determine which mistakes of law generate violations of rights and which implicate the availability of remedies. For example, would it violate the Fourth Amendment for an officer to conduct a stop under the reasonable belief that a statute forbids the conduct he observed, even though no such statute exists? *See United States v. Chanthasouxat*, 342 F.3d 1271, 1278 (11th Cir. 2003) (no statute mandating an inside rear-view mirror). Where the officer mistakenly but reasonably believes that two neighboring jurisdictions' laws are the same? *See United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) (tribal brake light law did not match state brake light law). Or where the police officer made a reasonable mistake of Fourth Amendment law regarding an issue that the regional appellate court had not directly spoken to at the time of the stop? *See United States v. Aguiar*, 737 F.3d 251, 261 (2d Cir. 2013). Nothing in the North Carolina Supreme Court's opinion or elsewhere in existing jurisprudence supplies any metric for sorting out which of these mistakes of law would violate the

Fourth Amendment and which would be fodder only for suppression arguments.

Indeed, it is entirely unclear how adopting the North Carolina Supreme Court's rule could be squared with this Court's already-existing case law. In *Krull* and *Davis*, this Court treated reasonable reliance on erroneous judicial and legislative pronouncements of law as violating the Fourth Amendment. *See supra* at 23-24 (discussing those cases). But surely it is *less* offensive to rely on affirmative (but wrong) authority from the legislative or judicial branches than it is for police officers to rely on their own misreadings of local statutes. If the former violates the Fourth Amendment, so too must the latter.

2. Restricting the relevance of the reasonableness of police mistakes of law to the issue of suppression also allows courts to consider materials that can be relevant to the equitable task of devising proper remedies but that are off-limits when deciding whether the Fourth Amendment was violated.

For instance, in order to assess whether an officer's mistake of law was reasonable, courts need to inquire into whether the interpretation of law on which the officer acted was consistent with "state custom or practice." *United States v. Washington*, 455 F.3d 824, 828 (8th Cir. 2006). If so, the mistake is less blameworthy and less in need of deterrence. *See id.* In *Herring v. United States*, 555 U.S. 135 (2009), this Court held that such inquiries are pertinent in determining whether to suppress evidence, explaining that when an officer's mistake is an "isolated" occurrence and a "well trained officer would [not] have known that the search was illegal,"

suppression is inappropriate. *Id.* at 137, 145 (quoting *Leon*, 468 U.S. at 922 n.23) (internal quotation marks omitted).

Yet at the rights stage this Court has forbidden courts from examining whether an officer acted in contravention of local training or custom. As this Court explained in *Whren v. United States*, 517 U.S. 806 (1996), inquiries concerning whether the officer acted contrary to "usual police practices" or "standard procedures" are "trivialities" that do not bear on the legality of the officer's actions. *Id.* at 814-15. Hence, a proper inquiry into the reasonableness of a police officer's mistake of law can be performed only during the remedy stage.

Similarly, courts determining whether a mistake of law was reasonable also must inquire whether the officer's interpretation of the law was consistent with "state case law," or written "police manuals or training materials." *Washington*, 455 F.3d at 828. *Compare Davis*, 131 S. Ct. at 2428-29 (mistake was reasonable because local appellate precedent condoned officer's actions), *and Wilson*, 526 U.S. at 616 (fact that officers' actions were consistent with common police practice and some court decisions rendered their mistake of law reasonable), *with United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999) (holding that state appellate court decision clarifying meaning of relevant traffic law rendered officer's mistake of law unreasonable). Indeed, the North Carolina Supreme Court in this case found it pertinent that "[w]hen the stop at issue in this case occurred, neither th[at] Court nor the Court of Appeals had ever interpreted [the State's] motor

vehicle laws to require only one properly functioning brake light." Pet. App. 19a.

But this Court admonished in *Whren* that even insofar as they are objective, "police manuals and standard procedures" cannot inform "the search and seizure protections of the Fourth Amendment" itself. 517 U.S. at 815. Reliance on such local reference guides would impermissibly dictate that the meaning of the Fourth Amendment would "vary from place to place and from time to time." *Id.*

The same is true with respect to local case law. Such variance is acceptable with respect to potential *remedies* for Fourth Amendment violations – indeed, states may choose (as North Carolina has) to require the suppression of all evidence obtained from illegal searches and seizures, regardless of whether officers acted in good faith, *see Gates*, 462 U.S. at 252 (White, J., concurring); *State v. Carter*, 370 S.E.2d 553, 562 (N.C. 1988). But when it comes to "whether or not a search [or seizure] is reasonable within the meaning of the Fourth Amendment" itself, geographic variation according to local dictates is unacceptable. *California v. Greenwood*, 486 U.S. 35, 43 (1988).

In short, in order to consider the full panoply of evidence necessary to administer inquiries into whether mistakes of law were made in good faith, courts must conduct those inquiries at the remedy stage, where they have the tools necessary to properly evaluate the reasonableness of police officers' mistakes of law. Introducing the concept of good faith into the Fourth Amendment itself would create upheaval and instability.

3. Lastly, confining the relevance of an officer's mistake of law to the remedy stage safeguards respect for the rule of law. As Justice Brandeis explained in *Olmstead v. United States*, 277 U.S. 438 (1928), "Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. If the Government becomes a lawbreaker, it breeds contempt for the law." *Id.* at 485 (Brandeis, J., dissenting). It thus is critical that courts be able to tell people that police violate the Fourth Amendment when they act based on misinterpretations of the law.

This is so even if courts ultimately withhold a remedy. Doctrines such as the good-faith exception to the exclusionary rule and qualified immunity are sometimes said to create "a right-remedy gap" in the administration of constitutional law. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 87 (1999). But even where such a gap exists, a court's act of stating that a right was violated "helps protect rights from being obliterated by competing concerns. Rights rhetoric fosters a love of liberty that makes a system of individual rights effective." J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 Calif. L. Rev. 277, 279 (2010). Put another way, even when equitable considerations counsel against suppressing ill-gotten evidence, it "disserves basic rule-of-law values" for courts to deny the illegitimacy of police mistakes of law. Wayne A. Logan, *Police Mistakes of Law*, 61 Emory L.J. 69, 90 (2011).

III. Even If This Court Were To Import Good-Faith Considerations Into The Fourth Amendment Issue Here, The Holding Below Would Still Be Incorrect.

Even if this Court were to introduce the equitable and consequential considerations relevant in exclusionary rule cases into the meaning of the Fourth Amendment itself – thereby disavowing its statements in *Illinois v. Krull*, 480 U.S. 340 (1987), and *Davis v. United States*, 131 S. Ct. 2419 (2011), regarding the Fourth Amendment violations there; implicitly overruling its holdings in qualified immunity cases that seizures based on reasonable mistakes of law still violate the Fourth Amendment; and treating *Michigan v. DeFillippo*, 443 U.S. 31 (1979), as a case about rights instead of remedies – the North Carolina Supreme Court's holding would still not withstand scrutiny. The question whether to excuse police mistakes of law based on good-faith behavior turns on how doing so would "influence" the police and other relevant actors. *Krull*, 480 U.S. at 360 n.17. Refusing to excuse mistakes of the type at issue here has appreciably beneficial consequences in this respect. It ensures that officers are incentivized to learn and apply correct interpretations of the traffic code, and it prevents individuals from having to refrain from wholly innocent conduct to avoid exposing themselves to traffic stops.

A. Law Enforcement Officers Should Be Encouraged To Learn And Apply The Correct Interpretation Of The Law.

1. The North Carolina Supreme Court erred in suggesting that officers should not be discouraged

from conducting traffic stops for perceived, but non-existent, traffic violations. Pet. App. 16a.

When officers reasonably rely on the assurances of third parties – whether from magistrates in warrants, legislatures in statutes, courts in opinions, or clerks transmitting another police department's records – expressly authorizing searches or seizures, there is "nothing to deter." *Davis*, 131 S. Ct. at 2423; *see also id.* at 2429; *Herring v. United States*, 555 U.S. 135 141 (2009) (summarizing other cases). But this Court has explicitly reserved the question whether the same reasoning applies when an officer "act[s] outside the scope of [a] statute," but "in good faith, believes he is acting within the scope of a statute." *Krull*, 480 U.S. at 360-61 n.17.

Furthermore, this Court held in *United States v. Johnson*, 457 U.S. 537 (1982), that suppression is appropriate when officers make a mistake in the absence of any third-party directive about an "unsettled" point of law. *Id.* at 561; *see also United States v. Leon*, 468 U.S. 897, 913 (1984) (reaffirming *Johnson*). In this circumstance, this Court explained, deterrence has an important role to play. Officers on patrol are "engaged in the often competitive enterprise of ferreting out crime." *Leon*, 468 U.S. at 913-14 (quoting in turn *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (quoting in turn *Johnson v. United States*, 333 U.S. 10, 14 (1948))). A refusal to excuse mistakes of law provides an "incentive to err on the side of constitutional behavior." *Johnson*, 457 U.S. at 561; *see also Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring) ("[W]hen police decide to conduct a search or seizure in the absence of case law

(or other authority) exclusion of the evidence obtained may deter" violations of law).

An individual officer's misinterpretation of a traffic law closely resembles the situation in *Johnson*. As in *Johnson*, a misinterpretation of the traffic code involves an officer on patrol taking an overly aggressive view of a legal issue on which "reasonable minds may differ." *United States v. Davis*, 598 F.3d 1259, 1267 (11th Cir. 2010), *aff'd*, 131 S. Ct. 2419 (2011) (internal quotation marks and citation omitted). As the only three courts of appeals to have squarely considered the question (all in the context of evaluating the applicability of the good-faith exception to the exclusionary rule) have recognized, this is very different than relying on an explicit directive from a court or legislature. *Id.*; *see also United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006); *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000). And it is something worthy of deterrence – at least in the sense of deeming such seizures as unconstitutional.

Indeed, in a world in which police officers would be allowed to conduct traffic stops anytime state law could reasonably be interpreted to prohibit the conduct the officer observed, officers would be all but invited to read traffic statutes aggressively. Instead of trying to determine the best reading of the law, authorities wishing to vigorously enforce the law would be encouraged to identify the broadest possible range of *plausible* readings of any given traffic law, for such an approach would support traffic stops in the greatest number of cases.

Not only would this incentive be problematic on its own terms, but it also would threaten to put officers' interpretive practices at odds with well-established doctrines of strict construction, lenity, and vagueness. *See supra* at 18-19. When officers confront ambiguous statutes on which they lack outside guidance, they should be encouraged to do exactly what other branches of the government must: construe ambiguous statutes narrowly, in favor of individual liberty. Only by measuring reasonable suspicion against the correct interpretation of the law can the Fourth Amendment ensure these incentives are aligned.

2. Measuring reasonable suspicion against the correct interpretation of the law also encourages officers to take advantage of available tools to become more familiar with the law. Officers have a variety of means at their disposal to help them determine the meaning of traffic laws, including the extensive availability of targeted legal education at police training academies, increasingly powerful technology in officers' cruisers and pockets, and the ability to ask for clarifications from individuals trained in the law (such as local counsel or lawyers in an attorney general's office). Only by refusing to excuse officers' mistakes of law would officers be properly motivated to make use of these resources.

What is more, law enforcement agencies typically have unique relationships with lawmakers and access to the legislative process. *See, e.g.*, Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 (2005); Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 232 n.31 (2007). If police departments are struggling to

determine the correct meaning of certain laws, the Fourth Amendment should encourage them to ask legislatures to clarify the statutes – not to eschew such clarification for fear that removing ambiguity in traffic statutes will restrict their power.[4]

B. Citizens Should Not Be Exposed To Traffic Stops For Engaging In Wholly Innocent Conduct.

Measuring reasonable suspicion against the correct interpretation of the traffic code also avoids problematic consequences for law-abiding citizens.

1. The North Carolina Supreme Court suggested that a traffic stop "is not a substantial interference with the detained individual." Pet. App. 14a. This Court has recognized, however, that citizens have a "private interest in avoiding" traffic stops, *Whren v. United States*, 517 U.S. 806, 817-18 (1996), because such seizures *are* a substantial infringement on one's liberty. A traffic stop constitutes a "possibly unsettling show of authority," *Delaware v. Prouse*, 440 U.S. 648, 657 (1979), and involves "the loss of our freedom to come and go as we please without police interference," *Navarette v. California*, 134 S. Ct. 1683, 1697 (2014) (Scalia, J., dissenting). Traffic

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[4] This is not to say that the onus to generate unambiguous laws falls primarily on law enforcement agencies, or on this Court through the tool of constitutional jurisprudence. It is primarily the job of legislatures to enact clear laws. At the same time, "[t]he less the courts insist on precision, the less the legislatures will take the trouble to provide it." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 301 (2012).

stops moreover "create substantial anxiety," "interfere with freedom of movement, are inconvenient, and consume time." *Prouse*, 440 U.S. at 657.

More seriously, a simple mistaken traffic stop can escalate into a series of increasingly invasive acts. Police effectuating traffic stops may conduct protective pat-downs, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), which this Court has recognized "must surely be an annoying, frightening, and perhaps humiliating experience," *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). They also may request consent to conduct consensual searches, which, as this case demonstrates, can be difficult for motorists to refuse. Officers who conduct traffic stops also have the discretion to arrest offending motorists, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), which can then lead to involuntary searches of the person's possessions, *United States v. Robinson*, 414 U.S. 218 (1973), strip searches, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012), and possibly even the collection of DNA samples, *Maryland v. King*, 133 S. Ct. 1958 (2013).

2. It would be much more difficult – indeed, sometimes downright impossible – for people to avoid being exposed to the possibility of traffic stops if a mistake of law could supply reasonable suspicion. Traffic laws are classic *malum prohibitum* statutes; they typically proscribe conduct not because it is inherently blameworthy but rather to further more regulatory objectives. That being so, the main way for citizens to avoid tripping over such statutes is to familiarize themselves with the traffic code. People study the code in order to take the driving tests

necessary to obtain driver's licenses, and potentially also when deciding whether to spend the money to fix a particular piece of equipment on an old car.

Yet under the North Carolina Supreme Court's holding, people seeking to avoid exposing themselves to the burdens of traffic stops would have to discern not only their legal obligations but also some unidentified sphere of wholly innocent activity that a police officer could reasonably believe is also prohibited. The North Carolina Supreme Court did not offer any definition of what would constitute a "reasonable" mistake of law in this respect. But in the context of qualified immunity, this Court has defined a reasonable mistake of law as "protect[ing] 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Only when the proper interpretation of law is "beyond debate" is a mistake of law unreasonable. *al-Kidd*, 131 S. Ct. at 2083; *see also Butler v. McKellar*, 494 U.S. 407, 415 (1990) (mistakes of law are "reasonable" for purposes of habeas retroactivity analysis unless the issue was not "susceptible to debate").

Similarly, in the context of deciding whether interpretations of ambiguous statutes are eligible for *Chevron* deference, this Court has explained that such interpretations are reasonable "even if the . reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). This reasonableness test affords agencies "a wide berth" when construing ambiguous statutes. *Nat'l Ass'n of Regulatory Util.*

Comm'rs v. Interstate Commerce Comm'n, 41 F.3d 721, 728 (D.C. Cir. 1994).

Whatever precise formulation would apply here, there can be no doubt that the scope of conduct covered by "reasonable" interpretations of traffic codes would be much broader than the scope of conduct covered by correct interpretations of those laws. That being so, officers would have much broader discretion to initiate traffic stops, and citizens would be forced to give a wide berth to the traffic code to account for this expansion of authority.

Even more troubling, officers would sometimes have the power to stop a motorist no matter what the motorist does. When a driver has only two choices and the governing law is capable of being reasonably read to prohibit either choice, an officer could stop the driver either way. Take, for example, the stop at issue in *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006). There, the driver came to a ninety-degree curve where the road changed names. The local traffic code did not clearly specify whether using a signal [illegible]er this circumstance was necessary, or even p[illegible]ssible. After the driver activated his signal, the officer "concluded that McDonald did not need to use his turn signal at the bend in the road and that he must have improperly used the signal." *Id.* at 960. Yet had the defendant not signaled, an officer might also reasonably have believed that taking the ninety-degree curve onto a road of a different name required a signal.

Worse yet, were a court to adopt the position that an officer can make a reasonable mistake about the very *existence* of a law, the citizen's quandary would only deepen, for now she would have to hypothesize

about the non-existent laws that might reasonably exist, but do not. This was the case in *Travis v. State*, 959 S.W.2d 32 (Ark. 1998), in which the court held that a traffic stop for failing to display an expiration date sticker on a license plate comported with the Fourth Amendment, even though state law required no such sticker. *Id.* at 33-35. Surely it is unfair to require citizens seeking to steer clear of police contact to imagine what an officer might reasonably believe should be against the law but is not.

3. The North Carolina Supreme Court advanced a different perspective: It asserted that "most motorists would actually prefer" to be stopped whenever an officer reasonably believes such a seizure is necessary to "maintain[] safe roadways," even if the motorist is fully in compliance with the traffic code. Pet. App. 14a. But there can be no argument that the stop at issue here was meant to address any safety concern. The officer in this case was conducting criminal interdiction, "looking for criminal indicators," J.A. 13, 26. The officer stopped petitioner's car because he believed he had observed a violation of state traffic law, not because he had any safety concerns. Pet. App. 5a. And the officer ultimately wrote "a warning ticket for a brake light, improper equipment." J.A. 22.

In any event, the North Carolina Supreme Court's safety rhetoric ignores the critical distinction between those who write the laws and those who enforce them. In North Carolina, as elsewhere, it is first and foremost "the legislature's job" to decide which activities are unsafe and thus should be prohibited, not a police officer's. Pet. App. 27a

(Hudson, J., dissenting). And the North Carolina General Assembly has squarely addressed the extent to which vehicles on the State's roadways must have working brake lights – determining that a single working light is sufficient. Pet. App. 34a. Especially when a legislature has considered and resolved an issue as directly as this, the responsibility of law enforcement is to learn and apply what the statute provides, not reinterpret and broaden the law according to officers' own intuitions about what they think would best protect public safety.

* * *

At bottom, this case involves a simple proposition: This Court should demand of the officers who stopped petitioner exactly what those officers intended to demand of him as a citizen – knowledge of the law. Anything less would undermine long-settled relationships between the people and their government. It would also destabilize this Court's carefully delineated Fourth Amendment doctrine distinguishing rights from remedies. There is no good reason to inflict such damage upon our constitutional structure.

CONCLUSION

For the foregoing reasons, the judgment of the North Carolina Supreme Court should be reversed.

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RESPONDENT'S BRIEF

No. 13-604

In the *Supreme Court of the United States*

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

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QUESTION PRESENTED

Whether a law enforcement officer's objectively reasonable mistake of law can support reasonable suspicion for an investigatory stop under the Fourth Amendment.

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STATEMENT

This case involves the Fourth Amendment implications of a police stop of a motor vehicle when there is reasonable suspicion that a law has been violated. The Supreme Court of North Carolina held that the officer's reasonable mistake of law, like a reasonable mistake of fact, can provide reasonable suspicion.

1. Early one morning in 2009, Sergeant Matt Darisse of the Surry County Sheriff's Department was observing traffic on Interstate 77 as part of a criminal interdiction operation. (J.A. 13) When he observed a Ford Escort pass by, he pulled out behind the vehicle. (J.A. 15) He noticed that when the Escort approached a slower moving vehicle and applied its brakes, the right-side brake light was out. (J.A. 15) Sergeant Darisse then put on his blue lights. (J.A. 15) A review of the patrol car video confirmed that the Escort's "right brake light was not functioning at the time of the instigation of the stop." (J.A. 4, 16, 28)

Sergeant Darisse had noticed when he put his blue lights on that a passenger — who turned out to be petitioner — "popped his head up" and then went right back down out of sight. (J.A. 16) When Sergeant Darisse approached the vehicle and informed the driver, Maynor Javier Vasquez, that he had been stopped for a non-functioning brake light (J.A. 5), he saw petitioner lying in the back seat. (J.A. 16-17) Petitioner remained in the back seat lying down for much of the stop. The check of the vehicle's registration revealed that the car belonged to petitioner. (J.A. 24)

Sergeant Darisse issued Vasquez a warning ticket for the brake light and explained it to him. (J.A. 22-23) He then asked for and received permission from Vasquez to ask him some more questions, and ultimately asked him if he could search the vehicle for illegal weapons and drugs. (J.A. 24-25) Vasquez indicated that while he did not mind, it was not his car and that Sergeant Darisse would have to ask petitioner. (J.A. 25) Petitioner gave verbal consent to search the vehicle. (J.A. 25, 37)

The search of the vehicle revealed "a cellophane wrapper with a white powder residue" in the door panel on the driver's side and "burnt marijuana seeds in the ashtray." (Pet. App. 3a) The search of a duffel bag located in the "back hatch" area of the Escort revealed approximately two ounces of cocaine. (Pet. App. 3a; J.A. 37-38) Both petitioner and Vasquez were charged with trafficking in cocaine. (Pet. App. 3a)

2. Petitioner filed both a motion to suppress and a later-amended motion to suppress the evidence obtained during the search of his vehicle. (J.A. 3) The trial court denied these motions, concluding in relevant part that Sergeant Darisse "had a reasonable and articulable suspicion that the subject vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light." (J.A. 8-9)

Petitioner pleaded guilty to two counts of attempted trafficking in cocaine while reserving his right to appeal from the denial of his motion to suppress. (Pet. App. 31a)

3. The North Carolina Court of Appeals reversed the denial of petitioner's motion to suppress, declaring "an officer's mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable justification for a traffic stop." (Pet. App. 32a)

The opinion analyzed various statutory provisions relevant to the question whether both brake lights on a motor vehicle must be operable, holding that "the malfunction of a single brake light, where a vehicle has at least one functioning brake light, is not a violation of N.C.G.S. § 20-129(g), N.C.G.S. § 20-129(d), or N.C.G.S. § 20-183.3." (Pet. App. 33a) The text of each of these statutes is set out in the Appendix to this brief.

The court of appeals noted the provision in § 20-129(g) that the lawful operation of a motor vehicle "after December 31, 1955" requires a specific type of "stop lamp," and ruled that "[t]he use of the articles 'a' and 'the' before the singular 'stop lamp' throughout N.C.G.S. § 20-129(g) clearly conveys that, under the statute, only *one* stop lamp is required on the rear of the vehicle." (Pet. App. 34a) The court further ruled that language in § 20-129(d) that all "rear lamps" on a vehicle be in good working order did not mean that "all originally equipped *stop*

lamps be in good working order." (Pet. App. 38a) The court then stated that the language in N.C.G.S. § 20-183.3, the State's vehicle safety inspection statute, specifying functioning "[l]ights, as required by" N.C.G.S. § 20-129.1, "does not alter the requirement of N.C.G.S. § 20-129(g) that a vehicle be equipped with *one* brake light." (Pet. App. 38a, 39a)

Even while noting that the statute was "enacted several decades ago" and "retains an antiquated definition of a stop lamp, not reflecting actual vehicle equipment now included in most automobiles," the court of appeals held that "the justification for the stop was objectively unreasonable" and violated petitioner's Fourth Amendment rights because there was no statutory requirement that both brake lights on a motor vehicle be operating properly. (Pet. App. 39a)

4. The Supreme Court of North Carolina granted discretionary review and reversed, declaring that, "[a]fter considering the totality of the circumstances, we hold that Sergeant Darisse's mistake of law was objectively reasonable and that he had reasonable suspicion to stop the vehicle in which defendant was a passenger." (Pet. App. 20a)

The court assumed for purposes of its decision the correctness of the lower court's conclusion that North Carolina's statutes require a motor vehicle to have only one brake light because that "novel issue of statutory interpretation" was not the basis of review sought by the State. (Pet. App. 5a) Instead, the

question presented was whether a vehicular stop is "permissible when an officer witnesses what he reasonably, though mistakenly, believes to be a traffic violation." (Pet. App. 9a) The court characterized the court of appeals' rationale as essentially holding that "a police officer's mistaken belief about the requirements of the substantive traffic law is per se objectively unreasonable." (Pet. App. 6a-7a)

After analyzing decisions from other jurisdictions, the court found the reasoning of the Eighth Circuit to be "compelling" and consistent with the primary command of the Fourth Amendment – that law enforcement agents act reasonably." (Pet. App. 13a) The court held that "[a]n officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances," and that "requiring an officer to be more than reasonable, mandating that he be perfect, would impose a greater burden than that required under the Fourth Amendment." (Pet. App. 13a) The court further observed that it is "[p]rudent to endorse the reasonable interpretation of our traffic safety laws," particularly when "judged against society's interest in keeping its roads safe" (Pet. App. 14a), and described as "unwise and unwarranted" a requirement that officers "be omniscient" so as to accurately forecast how a reviewing court will interpret a statute. (Pet. App. 16a)

The court noted that not differentiating between the analysis of mistakes of law from mistakes of fact "allows reviewing courts to treat all police mistakes the same," by requiring "not that they always be correct, but that they always be reasonable." (Pet. App. 18a (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990)). The court found "no constitutional requirement to distinguish between mistakes of fact and mistakes of law in this context" (Pet. App. 18a), and concluded that, based on the totality of the circumstances, "there was reasonable, articulable suspicion to conduct the traffic stop" in this case. (Pet. App. 19a) The court therefore reversed and remanded the case for additional proceedings.

Three justices dissented, asserting that "[t]here is no room for reasonable mistakes of law" under this Court's decision in *Ornelas v. United States*, 517 U.S. 690 (1996) – "either the law was violated and the stop is reasonable, or the law was not violated and the stop is not reasonable." (Pet. App. 23a) The dissent acknowledged that there is "no doubt" that the stop of petitioner's vehicle resulted from "a reasonable belief that defendant violated the law by operating a vehicle with one malfunctioning brake light," and characterized the decision by the North Carolina Court of Appeals as "surprising." (Pet. App. 20a) However, the dissent argued that a bright-line rule invalidating stops based on mistakes of law merely asks "that our police be diligent in studying the law" (Pet. App. 26a), declaring that "[p]roper enforcement of the law requires accurate knowledge of the law" (Pet. App. 27a-28a)

5. On remand, the North Carolina Court of Appeals held petitioner's consent to search was valid and affirmed the denial of his motion to suppress. (Pet. App. 42a-61a) The Supreme Court of North Carolina affirmed. (Pet. App. 41a)

SUMMARY OF ARGUMENT

The investigatory stop of petitioner's vehicle complied with the Fourth Amendment because there was reasonable suspicion that the driver was violating a traffic law.

1. The reasonable-suspicion standard looks to the objective reasonableness of an officer's actions, consistent with the essential purpose of the Fourth Amendment to "impose a standard of 'reasonableness' upon the exercise of discretion by government officials." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). In addressing this standard, the Court has "consistently eschewed bright-line rules," *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), and instead has emphasized that the standard "takes into account 'the totality of the circumstances – the whole picture.'" *Naverette v. California*, 134 S. Ct. 1683, 1687 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

As to factual determinations made by officers, the reasonableness standard requires "not that they always be correct, but that they always be reasonable." *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). This justification for tolerating reasonable

mistakes of fact applies equally to reasonable mistakes of law made when an officer in the field enforces a counterintuitive and confusing statute, only later to have a court for the first time interpret the statute differently.

Under the common law, "[a] doubt as to the true construction of the law is as reasonable a cause for seizure as doubt respecting the fact." *United States v. Riddle*, 9 U.S. 311, 313 (1809). In *Michigan v. DeFillippo*, 443 U.S. 31, 40 (1979), a subsequent ruling that an ordinance was unconstitutional did not "undermine the validity of the arrest made for violation of that ordinance." There is no analytical justification to treat differently the conduct upheld in *DeFillippo* and an investigatory stop based upon an officer's mistaken, but reasonable, understanding of a traffic law.

2. The reasonableness of mistakes of fact sometimes determines whether a Fourth Amendment right has been violated, and sometimes determines whether the exclusionary rule or qualified immunity applies. The reasonableness of mistakes of law can likewise bear on both issues.

Petitioner's assertion that mistakes of law are relevant only to the issue of remedy is undermined by a fair reading of this Court's prior decisions applying the good-faith exception which have never held that a mistake of law is off-limits at the rights stage. Qualified immunity decisions likewise do not support this contention. The inquiries concerning the

objective reasonableness of an officer's conduct for qualified immunity and for the Fourth Amendment are distinct and not duplicative, *Saucier v. Katz*, 533 U.S. 194 (2001), because assessing whether the Fourth Amendment has been violated is a more particularized inquiry than the question of whether a right is clearly established for purposes of qualified immunity. *Brousseau v. Haugen*, 543 U.S. 194, 199-200 (2004).

3. Petitioner's proposed bright-line rule that mistakes of law, no matter how reasonable, can never support reasonable suspicion would inject unwarranted uncertainty into the daily actions of law enforcement officials. As such, it would be inconsistent with the basic tenets of official conduct, for "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). "[B]alancing the need to search [or seize] against the invasion which the search [or seizure] entails," *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (citations omitted), is accomplished by the reasonable-suspicion rule. Allowing objectively reasonable mistakes of law to support a finding of reasonable suspicion for an investigatory stop is wholly consistent with the policies and interests that underlie *Terry*.

This case illustrates the appropriateness of finding reasonable suspicion based on an objectively

reasonable, but mistaken, understanding of substantive law. No one disagrees that the officer stopped petitioner's vehicle based upon a reasonable belief of a violation. That reasonable belief was dispelled only by a "surprising" appellate court ruling that for the first time construed a traffic law on the books for more than fifty years to require only one functioning brake light. The Supreme Court of North Carolina correctly ruled that reasonable mistakes of law, like this one, can support reasonable suspicion.

ARGUMENT

I. AN OBJECTIVELY REASONABLE MISTAKE OF LAW CAN SUPPORT REASONABLE SUSPICION FOR AN INVESTIGATORY STOP.

"In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), [this Court] held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The Court later confirmed that police officers may conduct an investigatory stop of an automobile if they have "an articulable and reasonable suspicion that [the person stopped was] subject to seizure for violation of law." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

The reasonable-suspicion standard looks not at subjective motivations but at whether, under the totality of the circumstances, the officer had "a particularized and *objective* basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (emphasis added). An officer's actions can be objectively reasonable even if it turns out that he inaccurately assessed the facts and the suspect was not engaging in any criminal activity. So, too, can an officer act with reasonable suspicion when he stops a suspect based on an objectively reasonable mistake of law.

A. The reasonable-suspicion standard looks to the objective reasonableness of an officer's actions.

The reasonable-suspicion standard reflects that "[t]he touchstone of the Fourth Amendment is reasonableness[.]" *United States v. Knights*, 534 U.S. 112, 118 (2001). Indeed, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents[.]" *Prouse*, 440 U.S. at 653-54.

Reasonable suspicion for an investigatory stop is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United*

States, 517 U.S. 690, 696 (1996) (internal quotation marks omitted). Although reasonable suspicion demands more than "an inchoate and unparticularized suspicion or hunch," *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (internal quotation marks omitted), "some minimal level of objective justification" is all that is required. *Sokolow*, 490 U.S. at 7.

This objective standard of reasonableness "takes into account 'the totality of the circumstances – the whole picture.'" *Naverette v. California*, 134 S. Ct. 1683, 1687 (2014) (quoting *Cortez*, 449 U.S. at 417). As a result, this Court has avoided turning the "abstract" concept of reasonable suspicion into "'a neat set of legal rules,'" *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (quoting *Ornelas*, 517 U.S. at 695-96), and has "consistently eschewed bright-line rules." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

B. Objectively reasonable mistakes of fact can support reasonable suspicion.

Reasonableness has never been viewed through the prism of certainty or hindsight. To the contrary, reviewing courts should assess police judgments "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (per curiam); *see also* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.2(d), at 47 (4th ed. 2004) ("It is axiomatic that hindsight may not be employed in

determining whether a prior arrest or search was made upon probable cause."). Therefore, the question is "would the facts available to the officer at the moment of the seizure warrant a man of reasonable caution in the belief that the action was appropriate?" *Terry*, 392 U.S. at 21-22 (internal quotation marks omitted).

By *not* reviewing officers' *Terry* and traffic stops with the benefit of hindsight, courts accept that such stops can be reasonable even if we later learn that the officers' suspicions were mistaken. "[I]n order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must be made by agents of the government is not that they always be correct, but that they always be reasonable." *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990).

In discussing the probable cause standard, the Court explained why that must be so. The standard "seek[s] to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). The same is necessarily true with respect to the reasonable-suspicion standard.

That does not mean, of course, that any mistake by an officer will be excused. "[T]he mistakes must

be those of reasonable men, acting on facts leading sensibly to their conclusions Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.*

C. Objectively reasonable mistakes of law can likewise support reasonable suspicion.

That reasoning applies equally to mistakes of law because the crucial question is whether it was *objectively reasonable* for an officer to make an investigatory stop. An objectively reasonable mistake of law, like an objectively reasonable mistake of fact, can justify an investigatory stop.

1. The justification for tolerating reasonable mistakes applies equally to mistakes of law.

The reason why reasonable mistakes can support reasonable suspicion (and probable cause) applies fully to mistakes of law. As noted, "room must be allowed for some mistakes on [officers'] part" "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous." *Brinegar*, 338 U.S. at 176. Usually that uncertainty relates to the facts: is the suspect actually engaging in conduct that is criminal? Sometimes, however, that uncertainty is in the law itself.

An officer in the field may have great difficulty in interpreting complex state laws. *See Virginia v. Moore*, 553 U.S. 164, 175 (2008) (noting that "state law can be complicated indeed"). With new and often-changing laws, officers in the field should not be expected to be "legal technicians," *Ornelas*, 517 U.S. at 695; or expected "to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney." *United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999).

Any suggestion that an officer always can clarify his understanding of a law while in the field is not realistic. Officers often do not have the time to call an attorney or other "legal technician" whenever they believe they have observed a traffic violation. For example, given that even petitioner's trial counsel, the trial prosecutor, and the trial judge failed to challenge Sergeant Darisse's interpretation of the statutory provisions that were later found — after full briefing in an appellate court — to require only one working brake light, it is difficult to imagine that any assistance given to the officer in the field (or even before he was in the field) would have made any difference.

Just as an officer need not conduct further inquiry into the facts once he reasonably believes they suggest that criminal activity is afoot, an officer needs not conduct further legal inquiry once he reasonably interprets the law in the course of his duties.

2. The law has long recognized that mistakes of law can be objectively reasonable.

The notion of an objectively reasonable mistake of law is a familiar one. Most obviously, this Court has recognized in the context of qualified immunity that mistakes of law can be "objectively legally reasonable." *See Lane v. Franks*, 189 L. Ed. 2d 312, 326 (June 19, 2014) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.") (internal quotation marks omitted); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (considering the objective question whether a reasonable officer could have considered a warrantless search to be lawful).

The question whether a mistake of law is objectively reasonable does not take into account an officer's subjective beliefs or motivation. Instead, it takes into consideration such factors as whether the controlling law is "counterintuitive and confusing" and whether a mistaken interpretation of law is "common knowledge." *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005). "[I]n the absence of such evidence, officers cannot act upon misunderstandings of clear statutes or, worse yet, their own notions of what the law ought to be" because "an objectively reasonable mistake of law cannot be so unmoored from actual legal authority." *United States v. Washington*, 455 F.3d 824, 828 (8th Cir. 2006).

Applying this approach, courts have held that officers' mistakes of law are not objectively reasonable when the observed conduct did not meet the plain language and obvious interpretation of a statute or where case law had addressed the matter at hand. *See, e.g., United States v. Washington*, 455 F.3d 824, 827-28 (8th Cir. 2006); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005). In short, because "*subjective* good faith is not sufficient to justify [a] stop" and because "officers have an obligation to understand the laws that they are trusted with enforcing, at least to a level that is objectively reasonable[,] [a]ny mistake of law that results in a seizure must be *objectively* reasonable to avoid running afoul of the Fourth Amendment." *Martin*, 411 F.3d at 1001.

This is not to say that objectively reasonable mistakes of law will be anything more than exceedingly rare. Most traffic laws, for instance, are not "counterintuitive and confusing." But where there is a "counterintuitive and confusing" law and a misunderstanding of that law was objectively reasonable, there is no reason why a mistake of law should be treated differently from an objectively reasonable mistake of fact.

3. This Court has upheld officer actions based on mistakes of law.

As early as 1809, this Court recognized under the common law that "[a] doubt as to the true construction of the law is as reasonable a cause for

seizure as doubt respecting the fact." *United States v. Riddle*, 9 U.S. 311, 313 (1809). And this Court later made clear that "it is settled that [probable cause] imports circumstances which warrant suspicion, and that a doubt respecting the true construction of the law is as reasonable a cause of seizure as a doubt respecting a fact." *Averill v. Smith*, 84 U.S. 82, 92 (1873).

More recently, this Court has upheld a seizure based on the suspected violation of an invalid law. In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), this Court addressed whether an officer validly arrested respondent when the officer had probable cause to believe respondent violated a local ordinance later ruled unconstitutionally vague. This Court held that the invalidity of the ordinance "does not undermine the validity of the arrest made for violation of that ordinance." *Id.* at 40.

The Court explained that "[t]he ordinance is relevant to the validity of the search only as it pertains to the 'facts and circumstances' [that] constituted probable cause for arrest." *Id.* The question was whether, given the law as the officer reasonably understood it, the suspect's acts indicated that he was committing (or about to commit) an offense. Just as the officer "should not have been required to anticipate that a court would later hold the ordinance unconstitutional," *id.* at 38, an officer should not be required to anticipate that his objectively reasonable understanding of the law will turn out to be mistaken.

Petitioner strains to read *DeFillippo* as an exclusionary rule case (Pet. Br. 27-29), but that is wishful thinking. The only issue was whether the arrest was "lawful" and thus supported the search incident to arrest. 443 U.S. at 35. The issue was one of probable cause, not suppression. Lest there be any doubt, the decision expressly concluded that the ordinance's unconstitutionality "does not undermine *the validity of the arrest* made for violation of that ordinance." *Id.* at 40 (emphasis added); *see also id.* at 45 (Brennan, J., dissenting) (stating that "the Court holds that arrests and searches pursuant to the ordinance prior to its invalidation by the Michigan Court of Appeals are constitutionally valid").

The decision in *DeFillippo* has since been referred to as one regarding the legality of the arrest and search — *i.e.*, of the violation itself — not simply of suppression or appropriate remedy for a violation. *See Maryland v. King*, 133 S. Ct. 1958, 1971 (2013) (citing *DeFillippo* as addressing the lawfulness of the arrest); *Virginia v. Moore*, 553 U.S. 164, 173 (2008) (same); *Illinois v. Gates*, 462 U.S. 213, 256 n.12 (1983) (same); *Illinois v. Krull*, 480 U.S. 340, 346 (1987) (same).

4. Mistakes of fact and mistakes of law are often difficult to distinguish.

Another reason why different rules should not apply to mistakes of fact and mistakes of law is that there is often little conceptual difference between the two. It is therefore often difficult for courts to distinguish between them. And it is even more difficult for an officer in the field to make a split-second decision as to whether his uncertainty pertains to the law or a fact.

"[T]he proper characterization of a question as one of fact or law is sometimes slippery." *Thompson v. Keohane*, 516 U.S. 99, 110-11 (1995). Given that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive," *Miller v. Fenton*, 474 U.S. 104, 113 (1985), it should be no surprise that the line between mistakes of fact and mistakes of law is frequently blurred.

The difficulty of determining whether a mistake is one of law or one of fact is illustrated by another North Carolina case. In *State v. McLamb*, 649 S.E.2d 902 (N.C. Ct. App. 2007), an officer mistakenly believed the defendant was committing a speeding violation. Nothing in the case indicates that the officer was mistaken about the law prohibiting speeding above the posted limit; instead, the record shows he made a factual mistake about the speed limit at that particular location. Nevertheless, the North Carolina Court of Appeals found the mistake

to be a mistake of law that could never be objectively reasonable. *Id.* at 904.

Further illustrating the difficulty are two similar cases decided by different appellate courts. In each case, the courts considered whether there was reasonable suspicion for an investigatory stop when officers mistakenly believed a vehicle did not have a valid license plate. The Tenth Circuit viewed the mistake as one of law — whether the officer understood dealer tag regulations. *United States v. Pena-Montes*, 589 F.3d 1048 (10th Cir. 2009). In the other case, the Supreme Court of Idaho held a similar mistake to be one of fact. *State v. Horton*, 246 P.3d 673 (Idaho Ct. App. 2010) (noting that the line between mistakes of law and mistakes of fact "is not always easy to draw" and that "[t]he two types of mistakes [may be] inextricably connected").

The difficulty in distinguishing between mistakes of law and mistakes of fact also has arisen in qualified immunity cases. The Third Circuit held that officers made a mistake of fact — not a mistake of law — when they made arrests after watching what they believed to be obscene films and those films were later determined by a court as a matter of law not to be obscene. *Cambist Films, Inc. v. Duggan*, 475 F.2d 887, 889 (3d Cir. 1973). Despite its determination that the error was one of fact, the court stated:

> [I]t goes without question that the facts and circumstances available to the officers at

> the time of the seizure were such as to provide an ordinary person with a reasonable belief that an offense was being committed. Police officers are not expected to have a complete knowledge of the intricacies of case law.

Id. at 889.

Given the often-thin line between mistakes of fact and mistakes of law, and the difficulty courts often have in distinguishing the two, the categorization of a mistake should not be outcome-determinative.

D. Petitioner's arguments to the contrary are without merit.

Petitioner posits several reasons why he believes objectively reasonable mistakes of law cannot support investigatory stops. None is persuasive.

1. Petitioner complains (Pet. Br. 39) that stops based on mistakes of law infringe on the liberty of "law-abiding citizens." But, of course, the same is true for stops based on mistakes of fact. Like a person stopped under a mistaken view of the law, a person stopped under a mistaken view of the facts also was acting innocently.

We tolerate seizures based on mistakes because, as discussed, objective reasonableness is the test and officers must be given some leeway if they are to do their jobs effectively. If the officer acted reasonably,

then the citizen "suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society; he does not suffer a violation of the Fourth Amendment." *Rodriguez*, 497 U.S. at 184.

2. Relying on a court of appeals' gloss on *Whren v. United States*, 517 U.S. 806 (1996), petitioner argues that if officers' subjective motivations cannot render a traffic stop invalid, "'the flip side'" is that officers must correctly interpret the law. Pet. Br. 16-17 (quoting *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998)). That *ipse dixit* finds no support in *Whren* itself, which held nothing of the sort.

It also rests on the erroneous premise that allowing reasonable mistakes of law to justify traffic stops will allow officers to stop motorists at will. As discussed in §I(C)(2), *supra*, a mistake of law can support an investigatory stop only if the mistake is objectively reasonable — a showing that can rarely be made.

3. Petitioner further contends (Pet. Br. 17-18) that it is only fair that law enforcement officers be held to the same standard as that for citizens: ignorance of the law is no excuse. As an initial matter, petitioner overstates the breadth of the doctrine. As applied to criminal defendants, it is "subject to numerous exceptions and qualifications." 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.6(a) (2d ed. 2003); *see also* Mark D. Yochum, *The Death of a Maxim: Ignorance of the Law is no Excuse (Killed by Money, Guns and a Little Sex)*, 13

Journal of Civil Rights and Economic Development 635, 673 (1999) ("As an interpretive device, [the maxim] has been reduced to a starting point, at best, a faint predilection, almost to remind us of how criminal laws used to be.").

More fundamentally, petitioner's argument confuses the crime that prompted the initial stop and the crime of arrest. The officer's mistake of law in this case did not and could not have resulted in petitioner's being charged with the crime of having insufficient brake lights. Just as a citizen's incorrect belief that he is not violating a law generally does not absolve him of culpability for breaking that law, an officer's incorrect belief that a citizen *is* violating a law cannot result in a defendant's culpability for violating that non-existent law.

What matters here, however, is not whether petitioner actually broke the law for which he was stopped. What matters is whether Sergeant Darisse was objectively reasonable in believing the law was being broken. *See Arvizu*, 534 U.S. at 277 ("A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct."). Petitioner has not contested in this Court that he was.

4. For much the same reason, the rule of lenity and similar precepts have "no effect here." *But see* Pet. Br. 18-19. Here and elsewhere, the "prosecution is not actually brought under the law about which an officer is mistaken." Wayne A. Logan, *Police*

Mistakes of Law, 61 Emory L. J. 69, 96 (2011). The rule of lenity and related canons could have affected how the North Carolina courts interpreted the state's brake light provision. But that was not the offense for which petitioner was held criminally liable.

5. Towards the end of his brief, petitioner argues that reasonable mistakes of law may not support an investigatory stop because such a rule would not be justified under the test for determining whether unlawfully obtained evidence should be suppressed. Pet. Br. 35-37. As discussed in §II(D), *infra*, this appears to be a backdoor way for petitioner to argue an issue he chose not to present to the Court: whether, if investigatory stops may not be based on reasonable mistakes of law, the good-faith exception to the exclusionary rule would apply. We explain there that the good-faith exception *would* apply.

What matters for present purposes is that petitioner is far off the mark in suggesting that the answer to the question presented — whether reasonable suspicion can be based on a reasonable mistake of law — depends in any way on the answer to the exclusionary-rule issue. They are distinct inquiries.

The exclusionary rule "is a 'prudential' doctrine" whose "sole purpose is to deter future Fourth Amendment violations." *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011). The Court has therefore "limited the rule's operation to situations in which

this purpose is thought most efficaciously served" — namely, where "the deterrence benefits of suppression outweigh its heavy costs." *Id.* at 2426-27 (internal quotation marks omitted). That is not, of course, how the Court decides whether there was an underlying Fourth Amendment violation in the first place. Not surprisingly, therefore, this Court has never applied its exclusionary rule doctrine to decide the predicate question whether the Fourth Amendment was violated. The issue here is how the reasonable-suspicion totality-of-the-circumstances test applies. The answer depends on the proper interpretation and application of *Terry* and later investigatory-stop cases. For the reasons discussed above, that inquiry shows that reasonable mistakes of law *can* justify an investigatory stop.

II. THE OBJECTIVE REASONABLENESS OF A MISTAKE OF LAW IS NOT RELEVANT ONLY TO THE ISSUE OF REMEDY.

Petitioner maintains (Pet. Br. 23) that "the reasonableness of a police officer's mistake of law is relevant to the remedy for a Fourth Amendment violation," and that "its relevance is strictly limited to that inquiry." The first proposition is correct; the second is not. The reasonableness of mistaken *facts* sometimes determines whether the Fourth Amendment was violated *and* sometimes determines whether the exclusionary rule or qualified immunity applies. The reasonableness of mistakes of law can likewise bear on both issues.

A. This Court's exclusionary rule cases do not support petitioner.

1. The exclusionary rule was first recognized in *Weeks v. United States*, 232 U.S. 383 (1914), and was applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). Recognizing that the Fourth Amendment "says nothing about suppressing evidence obtained in violation of [its] command," this Court created the rule to "compel respect for the constitutional guaranty." *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (citation and internal quotation marks omitted).

In a line of cases beginning with and following *United States v. Leon*, 468 U.S. 897 (1984), this Court created the good-faith exception to the exclusionary rule.[1] Because the exclusionary rule is "not a personal constitutional right" and its "sole purpose is to deter future Fourth Amendment violations," *Davis*, 131 S. Ct. at 2426 (citations and internal quotation marks omitted), the good-faith exception considers "the culpability of the law

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[1] The issue of whether a good-faith exception would apply in this case was not addressed below. The Supreme Court of North Carolina has held that under the state constitution there is no good-faith exception. *State v. Carter*, 370 S.E.2d 553, 562 (N.C. 1988). Although the North Carolina General Assembly has requested "that the North Carolina Supreme Court reconsider, and overrule, its holding in *State v. Carter*," *see* Act of March 18, 2011, ch. 6, sec. 2, 2011 N.C. Sess. Laws 11, the court has not reconsidered its ruling.

enforcement conduct"; whether it is law enforcement conduct at all; whether the conduct is "deliberate," "reckless," or "grossly negligent"; or whether isolated negligence is all that is involved. *Id.* at 2427.

2. This line of exclusionary rule cases does not show that "[t]his Court has repeatedly held that the reasonableness of a mistake of law is relevant only to the issue of remedy." Pet. Br. 24. That violations have been assumed in some cases where the good-faith exception has been applied does not mean they were found.

In *Davis*, for instance, this Court simply held that given the officer's objectively reasonable "good faith" reliance on judicial precedent — an issue different from the issue here — the defendant was not entitled to the remedy of exclusion. *Davis*, 131 S. Ct. at 2428. *Davis* did not create a new, different test for mistakes of law. Nor did it implicitly hold that the reasonableness of a mistake of law could never be considered as part of the Fourth Amendment reasonableness inquiry.

Indeed, in *Herring v. United States*, 555 U.S. 135 (2009), the Court opened its analysis by observing that "[w]hen a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation." *Id.* at 139. "For purposes of deciding [that] case, however," the Court "accept[ed] the parties' assumption that there was a Fourth Amendment

violation" and turned to "whether the exclusionary rule should be applied." *Id.* *Herring* did not so much as hint that the "mistaken assumptions" to which it referred were limited to assumption about facts, and not law. More generally, it stands as a caution against assuming that the Court, when deciding a case under the exclusionary rule, has implicitly concluded that the Fourth Amendment was violated in the first place.

Herring undermines petitioner's argument in still another way. The mistake in that case was a mistake of fact: the arresting officer thought there was an outstanding warrant for Herring's arrest, but that warrant had been rescinded. *Id.* at 137-38. Under petitioner's reasoning (Pet. Br. 25), the Court's application of the good-faith exception to a mistake of fact demonstrates that the reasonableness of a mistake of fact cannot render a search or seizure lawful. But, as discussed, even petitioner recognizes that an officer's mistaken assessment of the facts can justify an investigatory stop.

Nor is petitioner aided by *Illinois v. Krull*, 480 U.S. 340 (1987), which held that the exclusionary rule did not require suppression of evidence obtained in reliance on a state law that allowed for a search on less than probable cause. We are not contending that an officer's mistaken understanding of the Fourth Amendment itself can support a seizure if that understanding was reasonable. Here, Sergeant Darisse was interpreting a counterintuitive and

confusing *substantive* statute that described prohibited conduct. *See Michigan v. DeFillippo*, 443 U.S. 31, 39 (1979) (distinguishing arrest based on substantive statute that was later struck down from "evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant").

In sum, no decision concerning the good-faith exception has considered whether there was a Fourth Amendment violation in the first place, let alone restricted an objectively reasonable mistake of law only to the issue of remedy. And reading the "good faith" cases that way cannot be reconciled with the Court's recognition that the good-faith exception can be based on a reasonable mistake of fact.

B. This Court's qualified immunity cases do not support petitioner.

Petitioner contends that qualified immunity jurisprudence reinforces his contention that the reasonableness of a mistake of law matters only at the remedy stage. Pet. Br. 25. It does not.

Petitioner appears to reason as follows. This Court has granted officers qualified immunity where "a reasonable officer could have believed" that the search or seizure was lawful. Pet. Br. 26 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). And the Court has even done so after holding that the officer

violated the Fourth Amendment. *Id.* (citing *Wilson v. Layne*, 526 U.S. 603 (1999)). This must mean (the reasoning goes) that the reasonableness of an officer's actions does not matter when assessing whether there was an underlying Fourth Amendment violation; it only matters when deciding whether the office can be subjected to suit. For multiple reasons, it means nothing of the sort.

First, petitioner is once again relying on cases where the officers mistakenly interpreted the Fourth Amendment itself. *See, e.g., Wilson*, 526 U.S. at 614; *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). As discussed earlier, we have not suggested that a search or seizure is lawful if based on a mistaken, but reasonable, misunderstanding of the Fourth Amendment. This case, however, involves a reasonable misinterpretation of substantive law, which forms a critical part of the totality-of-the circumstances reasonable-suspicion inquiry.[2]

Second, what is objectively reasonable for Fourth Amendment purposes is not the same as what is objectively reasonable for qualified immunity purposes. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court reversed a lower court which had held that "qualified immunity is merely duplicative in" a

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[2] That explains this Court's statement in *Saucier v. Katz*, 533 U.S. 194, 206 (2001), that "*Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions." The "reasonable mistake as to the legality" referred to mistakes about what the Fourth Amendment permits, not mistakes about substantive law.

Fourth Amendment "excessive force case" because both issues "concern the objective reasonableness of the officer's conduct." *Id.* at 200, 203. To the contrary, this Court held, "[t]he inquiries for qualified immunity and [the Fourth Amendment] remain distinct[.]"). *Id.* at 204. *See also Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004) (stating that assessing whether the Fourth Amendment was violated is a "more 'particularized'" inquiry than assessing whether that right is "'clearly established'" and deciding only the latter). A court's holding that an officer is entitled to qualified immunity from a lawsuit alleging a Fourth Amendment violation therefore tells us nothing about whether a reasonable mistake of law can support an investigatory stop.

Third, petitioner's logic (once again) proves too much because it encompasses mistakes of fact. An officer's objectively reasonable mistake of fact can support an investigatory stop in one case; in another case, it can support a grant of qualified immunity. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991) (per curiam) (holding petitioners were entitled to qualified immunity resulting from a reasonable mistake of fact). If mistakes of fact can be considered when assessing Fourth Amendment rights *and* remedy, one is hard pressed to show that reasonable mistakes of law are relevant only to the issue of remedy.

C. Petitioner's prudential arguments for confining the relevance of reasonable mistakes of law to the remedy stage lack merit.

Petitioner sets out three prudential concerns that supposedly make it "[c]rucial" that the reasonableness of mistakes of law be considered only at the remedy stage. Pet. Br. 29-34. These concerns are irrelevant in most cases, are vastly overstated, or beg the question.

1. Petitioner first expresses concern (Pet. Br. 30) that courts will be overburdened by the task of assessing whether an officer's mistake of law was reasonable. For the most part, however, "it appears that the *Terry* rule has been workable and easily applied by officers on the street." *Atwater v. City of Lago Vista*, 532 U.S. 318, 366 (2001) (O'Connor, J., dissenting). That a bright-line rule might sometimes be easier to apply is no reason to "depart from careful case-by-case assessment of [the totality analysis] and adopt [a] categorical rule." *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013).

Nothing indicates that federal courts in the Eighth Circuit have had any difficulty assessing whether an officer's mistake of law is reasonable. Indeed, district courts in that circuit have with seeming ease found mistakes of law unreasonable as well as reasonable. *See, e.g., United States v. Murillo-Figueroa*, 862 F. Supp. 2d 863, 869 (N.D.

Iowa 2012) (finding officer's interpretation was not objectively reasonable).

More fundamentally, under petitioner's proposed rule, courts would still have to "resolve new and difficult questions" about the reasonableness of mistakes of law — for purposes of deciding whether the evidence should be suppressed. The Supreme Court of North Carolina may have disavowed the good-faith exception to the exclusionary rule, but most state courts have not. *See State v. Ward*, 604 N.W.2d 517, 534 n.16 (Wis. 2000) (noting that only twelve states have squarely rejected the good-faith exception under their state constitutions). In most state courts and the federal system, therefore, petitioner's "save the issue for the remedy stage" approach saves no judicial resources and avoids no difficult issues.

Further, as discussed in §I(C)(2), *supra*, this issue most often arises in the context of traffic stops — and there is every reason to believe that most traffic laws are well understood and clearly established. Courts already are tasked with utilizing the totality-of-the-circumstances test. Assessing whether mistakes of law were objectively reasonable would add barely a blip to the courts' workload.

2. Petitioner next argues (Pet. Br. 31) that allowing reasonable suspicion to be based on reasonable mistakes of law will require courts to take into account materials — such as police department policies, customs, and training — "that

are off limits when deciding whether the Fourth Amendment was violated." This argument assumes its conclusion. This Court has never held that such materials are off limits; and if they are, an officer's objective reasonableness would have to be assessed without them.

While these materials "may sometimes provide objective assistance," *Whren v. United States*, 517 U.S. 806, 815 (1996), at least where they include a reasonable interpretation of an uncertain statute, the Supreme Court of North Carolina did not consider any of them. Instead, it considered only that the officer's interpretation of the statutory provisions in question had never been challenged and the counterintuitive and confusing nature of the provisions themselves.[3] Pet. App. 18a-19a.

Nor does our position mean that the Fourth Amendment would "vary from place to place and from time to time." Pet. Br. 33 (internal quotation marks omitted). The reasonable-suspicion and probable-cause standards necessarily require assessing whether a suspect's conduct suggests he is violating (or about to violate) a particular law, whether it be federal, state, or local law. Conduct that would create reasonable suspicion of a crime in one state might not create reasonable suspicion of a

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[3] In considering the reasonableness of the officer's interpretation, the Supreme Court of North Carolina did note that a federal regulation, 49 C.F.R. § 571.108, requires that a passenger vehicle maintain two red brake lights. Pet. App. 19a.

crime in another state. There will therefore always be some "geographic variation according to local dictates." Pet. Br. 33.

Although each state's substantive law is different, the requirements of the Fourth Amendment stay the same: objective reasonableness is required. The Fourth Amendment does not vary from place to place by assessing the reasonableness of an officer's mistake of law any more than it varies from officer to officer when a specific officer's training and experience is considered in the totality-of-the-circumstances test used to determine his reasonableness. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) (allowing officers "to draw on their own experience and specialized training").

3. Petitioner concludes with a puzzling argument. He acknowledges that his position, if adopted, may not aid most defendants because courts may "ultimately" decline to suppress evidence obtained based on an objectively reasonable mistake of law. Pet. Br. 34. That should not matter, he argues, because adopting his position will "safeguard[] respect for the rule of law." *Id.* While that may rescue this case from utter irrelevance (outside of North Carolina and the few other states that have rejected the good-faith exception), it does not actually provide a reason why his position on the question presented is correct. For the many reasons given above, it is not.

D. If this Court were to hold that investigatory stops may not be based on reasonable mistakes of law, the good-faith exception to the exclusionary rule would apply.

Although petitioner has not directly asked this Court to resolve whether the good-faith exception to the exclusionary rule would apply should the Court answer the question presented in his favor, his brief sets out his argument for why it would not. Pet. Br. 35-37. It does this by collapsing the underlying Fourth Amendment issue and exclusionary-rule issue, and arguing that he should prevail on the former based on exclusionary-rule doctrine. As explained in §I(D), that apples-and-oranges argument is misguided. The underlying Fourth Amendment issue must be resolved by applying *Terry* and other cases that explicate the meaning of the Fourth Amendment, not by applying the "prudential" exclusionary rule doctrine.

That said, petitioner's argument regarding how the good-faith exception to the exclusionary rule applies in this context should not go unanswered. Because the exclusion of evidence "exacts a heavy toll on both the judicial system and society at large," the Court imposes that remedy "only as a last resort." *Davis*, 113 S. Ct. at 2427 (internal quotation marks omitted). For that reason, suppression "tends" to be warranted "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." *Id.* (quoting *Herring*,

555 U.S. at 143). By contrast, "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Id.* at 2429 (quoting *Leon*, 468 U.S. at 919); *see also Krull*, 480 U.S. at 348-49 ("evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment") (internal quotation marks omitted).

Under those principles, this is an easy case in which even petitioner acknowledges the officer's mistake of law "was understandable." Pet. 21. The police conduct in question is an investigatory stop based on an objectively reasonable mistake of law. By definition, such conduct is not deliberate, reckless, or grossly negligent — that is, the sort of conduct for which suppression is the proper remedy. Rather, such conduct falls squarely within the rule that "exclusion should not be applied to deter objectively reasonable law enforcement activity."

Petitioner ignores all of this and instead relies on a footnote in *Krull* which stated that "whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence." 480 U.S. at 360 n.17. That general statement provides little to no guidance as to how the rule should apply in any particular case. By contrast, the analysis from *Davis*, *Herring*, and *Leon*

discussed above provide guidance and strongly militate against suppression.

Petitioner also relies on *United States v. Johnson*, 457 U.S. 537 (1982), which he claims held "that suppression is appropriate when officers make a mistake in the absence of any third-party directive about an 'unsettled' point of law." Pet. Br. 36 (quoting *Johnson*, 457 U.S. at 561). *Johnson* held no such thing. At issue in *Johnson* was whether the rule announced in *Payton v. New York*, 445 U.S. 573 (1980), applies retroactively to cases not yet final when *Payton* was issued. 457 U.S. at 538-39. The Court held that it does under its pre-*Griffith v. Kentucky*, 479 U.S. 314 (1987), retroactivity doctrine.[4]

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[4] Petitioner states (Pet. Br. 36) that *Leon* "reaffirm[ed] *Johnson*." *Leon*, in the course of adopting the good-faith exception, turned to "decisions not involving the scope of the [exclusionary] rule itself" and cited *Johnson* for the proposition that "[t]he propriety of retroactive application of a newly announced Fourth Amendment principle has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct." *Leon*, 468 U.S. at 911-13. That hardly "reaffirm[s]" that *Johnson* adopted the exclusionary rule principle petitioner attributes to it.

III. UPHOLDING STOPS BASED ON REASONABLE MISTAKES OF LAW ADVANCES THE INTERESTS THAT UNDERLIE THE *TERRY* DOCTRINE.

Terry v. Ohio addressed "an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." 392 U.S. 1, 20 (1968). The Court recognized that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972) (describing *Terry*). But that left the question of when, exactly, an officer may make an investigatory stop.

In answering that question, the Court first confirmed that the underlying test was "reasonableness." *Terry*, 392 U.S. at 20. It then explained that what is reasonable depends on "balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Id.* at 21 (internal quotation marks omitted). The reasonable-suspicion rule — which allows a temporary seizure if "specific and articulable facts," and "rational inferences from those facts, reasonably warrant [the] intrusion" — emerged from those considerations. *Id.* And those considerations fully

support the rule that reasonable suspicion can be based on a reasonable mistake of law.

1. A police officer can reasonably misinterpret the law for a number of reasons. A court might adopt a construction of a statute that upsets long-held understandings.[5] The officer might have relied on a statute's plain text, but a court later interprets it in an atextual manner.[6] The officer might rely on a regulation that is later found to be inconsistent with the governing statute. And so on.

Is an officer acting unreasonably, and therefore in violation of the Fourth Amendment, when he conducts a *Terry* or traffic stop based on his reasonable conclusion that a person is violating such a law? He is not. We expect police officers to enforce the law as they reasonably understand it, not "shrug [their] shoulders" and stand aside.

Petitioner suggests that officers should not enforce statutes whose scope is unsettled because that would make officers too "aggressive" and that

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[5] *See, e.g., Brogan v. United States*, 522 U.S. 398 (1998) (interpreting a statute to the contrary of what many circuits had held for many years); *see also id.* at 420 (Stevens, J., dissenting) (noting "the virtually uniform understanding of the bench and the bar that persisted for decades with the approval of this Court as well as the Department of Justice").

[6] *See, e.g., Moskal v. United States*, 498 U.S. 103 (1990) (adopting an atextual interpretation of the phrase "falsely made").

courts should give them an "incentive to err on the side of constitutional behavior." Pet. Br. 36, 37. That argument defies common sense.

Traffic statutes play a critical role in ensuring the safety on the roads. *See Brown v. Boren Clay Products Co.*, 168 S.E.2d 452, 455 (N.C. Ct. App. 1969) (noting that North Carolina statute requiring rear lamps "is a safety statute enacted for the protection of persons and property"). They can only play that role if they are enforced by police officers. *See Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (noting that "[t]he foremost method of enforcing traffic and vehicle safety regulations is acting upon observed violations"). Petitioner, however, advocates that officers decline to enforce traffic safety statutes that may be unclear. That could not be what the Fourth Amendment requires.

A professionally trained, effective, law-abiding officer is not necessarily a timid officer. *Terry* recognized that the police must take "swift action predicated upon on-the-spot observations" if there is to be "effective crime prevention and detection." 392 U.S. at 20, 22. The Fourth Amendment simply requires that they do so reasonably. An officer adheres to that standard, and does not act unduly "aggressively," by acting upon his reasonable understanding of substantive law.

Petitioner's "incentive to err on the side of constitutional behavior" approach is irreconcilable with a reasonableness standard, which by its nature

produces false positives. *See Illinois v. Wardlow*, 528 U.S. 119, 126 (2000) (holding that Fourth Amendment accepts the risk that "officers may stop innocent people"). The *Terry* standard gives officers an incentive to act reasonably, which *is* "the side of constitutional behavior."

Petitioner is similarly off-base when he insists (Pet. Br. 38) that penalizing reasonable mistakes of law "encourages officers to take advantage of available tools to become more familiar with the law." Police officers could not do their jobs if they did not know the law intimately. The notion that a police officer would choose to remain ignorant of the law in the hope that a later mistake of the law would fortuitously turn out to be objectively reasonable cannot be taken seriously. Objectively reasonable mistakes of substantive law are rare and have built-in expiration dates. Once a court construes a traffic law contrary to an officer's prior interpretation, the officer must abide by that construction. A mistake of law like the one in this case is, by its very nature, self-limiting. No rational officer would choose ignorance for such a small pay-off. *Cf. Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (noting "the increasing professionalism of police forces" and the "wide-ranging reforms in the education, training, and supervision of police officers") (internal quotation marks omitted).

2. This case perfectly illustrates why a stop based on reasonable suspicion that a person is violating the law as reasonably, but mistakenly,

understood is reasonable within the meaning of the Fourth Amendment. The unsettled question of law here involved the interpretation of a statute that had been on the books for more than fifty years. No one had ever challenged the interpretation that all brake lights were required to be in working order.[7] And petitioner's trial counsel, the trial prosecutor, and the trial judge all accepted the officer's interpretation of the counterintuitive and confusing statutory provisions at issue. *Compare* N.C. Gen. Stat. § 20-129(d) ("Every motor vehicle shall have all originally equipped rear lamps in good working order[.]) (App. 1-2), *with* N.C. Gen. Stat. § 20-129(g) ("No person shall operate on the highways of the State any motor vehicle unless it shall be equipped with a stop lamp on the rear of the vehicle.") (App. 3).

There is no reason to believe that Sergeant Darisse would have been given any different advice had he been able — in the field — to ask for an

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[7] Even the dissenting opinion in the Supreme Court of North Carolina recognized the reasonableness of the officer's misunderstanding of the law in this case, stating: "[T]here is no doubt in my mind that, when he stopped [petitioner's] vehicle, Sergeant Darisse acted upon a reasonable belief that [petitioner] violated the law by operating a vehicle with one malfunctioning brake light." Pet. App. 20a (Hudson, J., dissenting). The dissenting opinion also recognized "that, before the COA's surprising decision below, most citizens of this state believed that a malfunctioning brake light represented legal grounds for a traffic stop and citation." Pet. App. 20a.

interpretation of the law. Absent some clarification of the issue by a court, the officer did what any reasonable officer in his situation would have done — which is all the Fourth Amendment requires.

And this particular mistake of law can never again justify an investigative stop. An officer in North Carolina cannot reasonably believe that all brake lights need to be working on an automobile after the North Carolina Court of Appeals decided this issue of first impression otherwise.

3. In the face of this, petitioner sounds alarms that apply to all traffic stops, not just those based on reasonable mistakes of law. First, he expresses concern that traffic stops involve "the loss of our freedom" and can lead to pat-downs and consensual searches. Pet Br. 40 (internal quotation omitted). But settled law permits traffic stops based on reasonable suspicion, which means that innocent individuals will sometimes be stopped.

Next, he notes (Pet. Br. 41-42) that it will not always be clear when a mistake of law is objectively reasonable and that too broad an interpretation of what constitutes a reasonable mistake would give officers too much discretion. That objection can be levied against the entire *Terry* edifice. The Court has recognized that "the concept of reasonable suspicion is somewhat abstract," *Arvizu*, 534 U.S. at 274, and cannot be "'reduced to a neat set of legal rules.'" *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

That does not leave us rudderless, however. *De novo* appellate review enables the doctrine to "acquire content through application," "unif[ies] precedent," and helps create a "set of rules." *Ornelas*, 517 U.S. at 697 (internal quotation marks omitted). Petitioner's effort to insert a bright-line rule inside the fact-bound, context-bound totality-of-the-circumstances reasonable-suspicion test should be rejected. The Supreme Court of North Carolina correctly held that reasonable mistakes of law can support a finding of reasonable suspicion.

CONCLUSION

The judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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July 2014

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CHAPTER 20. MOTOR VEHICLES
ARTICLE 3. MOTOR VEHICLE ACT OF 1937
PART 9. THE SIZE, WEIGHT, CONSTRUCTION AND EQUIPMENT OF VEHICLES

N.C. Gen. Stat. § 20-129(d) (2013)

§ 20-129. Required lighting equipment of vehicles.

(d) **Rear Lamps.** – Every motor vehicle, and every trailer or semitrailer attached to a motor vehicle and every vehicle which is being drawn at the end of a combination of vehicles, shall have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle. One rear lamp or a separate lamp shall be so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be illuminated by a white light as to be read from a distance of 50 feet to the rear of such vehicle. Every trailer or semitrailer shall carry at the rear, in addition to the originally equipped lamps, a red reflector of the type which has been approved by the Commissioner and which is so located as to height and is so maintained as to be visible for at least 500 feet when opposed by a motor vehicle displaying lawful undimmed lights at night on an unlighted highway.

N.C. Gen. Stat. § 20-129(d)

Notwithstanding the provisions of the first paragraph of this subsection, it shall not be necessary for a trailer weighing less than 4,000 pounds, or a trailer described in G.S. 20-51(6) weighing less than 6,500 pounds, to carry or be equipped with a rear lamp, provided such vehicle is equipped with and carries at the rear two red reflectors of a diameter of not less than three inches, such reflectors to be approved by the Commissioner, and which are so designed and located as to height and are maintained so that each reflector is visible for at least 500 feet when approached by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway.

The rear lamps of a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas.

HISTORY: 1937, c. 407, s. 92; 1939, c. 275; 1947, c. 526; 1955, c. 1157, ss. 3-5, 8; 1957, c. 1038, s. 1; 1967, cc. 1076, 1213; 1969, c. 389; 1973, c. 531, ss. 1, 2; 1979, c. 175; 1981, c. 549, s. 1; 1985, c. 66; 1987, c. 611; 1989 (Reg. Sess., 1990), c. 822, s. 1; 1991, c. 18, s. 1; 1999-281, s. 1.

N.C. Gen. Stat. § 20-129(g)

CHAPTER 20. MOTOR VEHICLES
ARTICLE 3. MOTOR VEHICLE ACT OF 1937
PART 9. THE SIZE, WEIGHT, CONSTRUCTION AND EQUIPMENT OF VEHICLES

N.C. Gen. Stat. § 20-129(g) (2013)

§ 20-129. Required lighting equipment of vehicles.

(g) No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps.

HISTORY: 1937, c. 407, s. 92; 1939, c. 275; 1947, c. 526; 1955, c. 1157, ss. 3-5, 8; 1957, c. 1038, s. 1; 1967, cc. 1076, 1213; 1969, c. 389; 1973, c. 531, ss. 1, 2; 1979, c. 175; 1981, c. 549, s. 1; 1985, c. 66; 1987, c. 611; 1989 (Reg. Sess., 1990), c. 822, s. 1; 1991, c. 18, s. 1; 1999-281, s. 1.

N.C. Gen. Stat. § 20-129.1(9)

CHAPTER 20. MOTOR VEHICLES
ARTICLE 3. MOTOR VEHICLE ACT OF 1937
PART 9. THE SIZE, WEIGHT, CONSTRUCTION AND EQUIPMENT OF VEHICLES

N.C. Gen. Stat. § 20-129.1(9) (2013)

§ 20-129.1. Additional lighting equipment required on certain vehicles.

In addition to other equipment required by this Chapter, the following vehicles shall be equipped as follows:

. . . .

(9) Brake lights (and/or brake reflectors) on the rear of a motor vehicle shall have red lenses so that the light displayed is red. The light illuminating the license plate shall be white. All other lights shall be white, amber, yellow, clear or red.

HISTORY: 1955, c. 1157, s. 4; 1969, c. 387; 1983, c. 245; 1987, c. 363, s. 1; 2000-159, s. 10.

N.C. Gen. Stat. § 20-183.3

CHAPTER 20. MOTOR VEHICLES
ARTICLE 3A. SAFETY AND EMISSIONS INSPECTION PROGRAM
PART 2. SAFETY AND EMISSIONS INSPECTIONS OF CERTAIN VEHICLES

N.C. Gen. Stat. § 20-183.3 (2013)

§ 20-183.3. Scope of safety inspection and emissions inspection

(a) Safety. – A safety inspection of a motor vehicle consists of an inspection of the following equipment to determine if the vehicle has the equipment required by Part 9 of Article 3 of this Chapter and if the equipment is in a safe operating condition:

(1) Brakes, as required by G.S. 20-124.

(2) Lights, as required by G.S. 20-129 or G.S. 20-129.1.

HISTORY: 1965, c. 734, s. 1; 1969, c. 378, s. 2; 1971, c. 455, s. 2; c. 478, ss. 1, 2; 1979, 2nd Sess., c. 1180, s. 3; 1981 (Reg. Sess., 1982), c. 1261, s. 1; 1989, c. 391, s. 2; 1991, c. 654, s. 2; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 473, s. 2; 2000-134, ss. 8, 10, 12; 2001-504, s. 7; 2007-364, s. 1.

REPLY BRIEF

No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari
to the North Carolina Supreme Court

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REPLY BRIEF FOR PETITIONER

Despite rhetoric in the State's and Solicitor General's briefs, it is common ground among all involved that the Fourth Amendment does not treat all police mistakes the same. Petitioner contends that the Fourth Amendment cleanly differentiates between mistakes of fact and law, leaving the relevance of the latter – just as with respect to ordinary citizens' misapprehensions of law – to the question of remedy. The State and Solicitor General maintain that the Fourth Amendment condones police officers' mistakes not only of fact but also of "substantive law," while refusing to tolerate other mistakes of law, such as the mistakes in *Davis v. United States*, 131 S. Ct. 2419 (2011), and *Illinois v. Krull*, 480 U.S. 340 (1987). Resp. Br. 29-31; *accord* U.S. Br. 30 n.3.[1]

Only petitioner's proposed dichotomy comports with this Court's precedent. In *Krull*, this Court expressly disavowed any difference between so-called "procedural" and "substantive" mistakes of law. 480 U.S. at 355 n.12. And the Founding-era customs

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[1] The State acknowledges that this Court "assumed" in *Krull* that the officers' searches in reliance on a state law later deemed unconstitutional violated the Fourth Amendment. Resp. Br. 28-29. The Solicitor General never addresses *Krull*. But neither the State nor the Solicitor General questions this Court's several pre-*Krull* holdings that searches conducted in mistaken reliance on state statutes later deemed unconstitutional violate the Fourth Amendment. Petr. Br. 25 (discussing such cases). Petitioner takes this silence as acceptance of that legal rule.

cases on which the State and Solicitor General rely supply no reason to diverge from that reasoning. The tolerance of mistakes of law in those cases arose from an exception rather than the rule – and, even so, the issue in those cases was solely one of remedy. Thus, not only this Court's modern framework but also historical antecedents to the Fourth Amendment support petitioner's view that the reasonableness of mistakes of law is relevant only to remedies.

That leaves the State's and Solicitor General's attempts to defend the North Carolina Supreme Court's holding in terms of fundamental fairness and administrability. Neither attempt succeeds. The canon that ignorance of the law is no excuse does not excuse citizens for a traffic (or virtually any other) offense when the conduct at issue comported with an objectively reasonable construction of a statute but was nonetheless unlawful. Neither should the Fourth Amendment – in a Nation committed to the rule of law – excuse police officers under these circumstances. Furthermore, importing assessments of the reasonableness of mistakes of law into the context of rights would raise a host of new and difficult problems that neither the State nor the Solicitor General is willing to face up to.

This Court should reverse.

I. The Fourth Amendment Does Not Distinguish Mistakes Of "Substantive" Law From Other Mistakes Of Law.

The State and Solicitor General argue that the Fourth Amendment should distinguish between mistakes of "substantive" law and other mistakes of law for three basic reasons: (A) such treatment, they

say, comports with precedent; (B) such treatment finds support in an historical antecedent to modern precedent; and (C) the reasons for excusing mistakes of fact apply equally to mistakes of substantive law. None of these arguments, however, withstands scrutiny.

A. Current Fourth Amendment Precedent Treats Mistakes Of Substantive Law The Same As Other Mistakes Of Law.

Neither the State nor the Solicitor General seriously disputes that this Court's modern cases defining "reasonable suspicion" establish an objective, two-step inquiry, under which courts must first assess the historical facts and then must measure those facts against the applicable "rule of law." *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996); *see generally* Petr. Br. 12-14. Neither do the State or Solicitor General dispute that every Fourth Amendment case decided since *United States v. Leon*, 468 U.S. 897 (1984), sharply distinguishes between rights and remedies, cabining the relevance of the reasonableness of mistakes of law to the latter. The State and Solicitor General nevertheless insist that this Court's pre-*Leon* decision in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), dictates that the Fourth Amendment itself tolerates mistakes of "substantive criminal law." U.S. Br. 30 n.3; *see also* Resp. Br. 18-19.

The *DeFillippo* opinion cannot bear the weight the State and Solicitor General place upon it. Yes, this Court stated that the officer's arrest based on a mistaken presumption regarding the validity of a state criminal law comported with the Fourth Amendment. But, far from relegating its concern

with the exclusionary rule to "a footnote," U.S. Br. 19, the core of this Court's reasoning was that the Fourth Amendment was not violated *because the officers acted in "good faith."* *DeFillippo*, 443 U.S. at 38 (emphasis added) (quoting *Pierson v. Ray*, 386 U.S. 547, 557 (1967)). Officers, this Court stressed, "should not [be] required to anticipate that a court would later hold [an] ordinance unconstitutional" unless "any person of reasonable prudence would be bound to see its flaws." *Id.* at 37-38.

As petitioner has explained, this Court's post-*Leon* jurisprudence makes clear that the pertinence of such "good faith" legal errors is now strictly limited to the issue of remedy. Petr. Br. 23-29. An officer's reasonable failure to foresee how a court would later rule does not establish compliance with the Fourth Amendment itself. *Id.*

The State and Solicitor General protest that *DeFillippo* retains vitality as a pure Fourth Amendment holding because it distinguished good faith mistakes of "substantive" law from such mistakes regarding laws "purport[ing] to authorize the searches [or seizures] in question." *DeFillippo*, 443 U.S. at 39; *see* Resp. Br. 29-31; U.S. Br. 30 n.3. But the *DeFillippo* Court suggested that a substantive/procedural distinction existed only with respect to "the exclusionary rule," not the Fourth Amendment itself. *DeFillippo*, 443 U.S. at 39. What is more, once *Leon* clarified the landscape, this Court squarely repudiated even that "substantive-procedural dichotomy," holding that "[f]or purposes of deciding whether to apply the exclusionary rule, we see no valid reason to distinguish between statutes that define substantive criminal offenses and

statutes that authorize warrantless administrative searches." *Krull*, 480 U.S. at 355 n.12. Both the State and the Solicitor General ignore this holding. Once it is accounted for, their proposed framework disintegrates.

B. Historical Antecedents To Modern Fourth Amendment Law Limit The Relevance Of The Reasonableness Of Mistakes Of Substantive Law To, At Most, The Issue Of Remedy.

The State and the Solicitor General seek to bolster their request to import the reasonableness of mistakes of substantive law into the Fourth Amendment itself by analogizing the present controversy to cases applying Founding-era customs statutes. Resp. Br. 17-18; U.S. Br. 13-17. Those cases do not aid their cause.

1. It is important, at the outset, to recognize that neither the State nor the Solicitor General disputes that the common-law trespass jurisprudence "declined to excuse [searches or seizures] based on reasonable mistakes of law" like the one at issue here. U.S. Br. 17; *see also* Petr. Br. 14-16. And contrary to the Solicitor General's suggestion (Br. 17), this common law stretches back to the Founding (and even before). *See* Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. Rev. 363, 371-75 (2009). Accordingly, the "default legal regime" at the Founding – and for generations thereafter – was that police officers could not escape liability for even reasonable mistakes of substantive law. *Id.* at 371; Petr. Br. 14-16 (citing

Restatement of Torts § 121 cmt. i (1934) and other authorities).

This common-law tradition alone defeats the State's and Solicitor General's historical argument. As this Court has explained, while so-called findings of "probable cause" insulated officers from liability "where some statute create[d] and define[d] the exemption from damages," such statutory protection was the exception, not the rule. *The Apollon*, 22 U.S. (9 Wheat.) 362, 373 (1824); *accord Averill v. Smith*, 84 U.S. (17 Wall.) 82, 93 (1872). When trying to extrapolate Fourth Amendment principles from Founding-era practices, the prevailing rule at that time – not some exception – should control.

2. At any rate, not even the statutory exception the State and Solicitor General highlight supports their argument. The statutes on which this Court's holdings in *United States v. Riddle*, 9 U.S. (5 Cranch) 311 (1809), and related cases are based directed tax collectors to impound undervalued goods so that they could be properly assessed. Such collection of customs duties was uniquely important to the economic wellbeing of the new republic, so Congress wanted to ensure that collectors would not shy away from vigorously enforcing their mandates. Consequently, these statutes "departed from the common law," Arcila, 50 B.C. L. Rev. at 398, and allowed courts in subsequent civil forfeiture or condemnation actions to immunize collectors from liability for improper seizures when they made reasonable mistakes of law. *Riddle*, 9 U.S. (5 Cranch) at 311, 313; *see also, e.g.*, Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47.

The remedial aim of the statutory regime involved in *Riddle* and related cases makes clear that those cases have no bearing on the issue here. The sole purpose of the Founding-era customs statutes was to *immunize collectors from damages* for concededly wrongful seizures. The statutes, that is, were nothing more than a precursor to the concept of qualified immunity now implemented on a more universal basis under 42 U.S.C. § 1983. Even though the customs statutes used the term "probable cause" to implement the immunity they created, the circumstances under which courts found the statutes satisfied tell us no more about the meaning of "probable cause" under the Fourth Amendment than the circumstances under which modern courts immunize officers for "reasonable" illegal searches tell us about what the term "reasonable" means under the Fourth Amendment. *See* Petr. Br. 25-27.

C. There Is No Good Reason To Distinguish Mistakes Of Substantive Law From Other Mistakes Of Law.

Although the State and Solicitor General are at pains to separate police mistakes of "substantive" law from other mistakes of law, they hardly attempt to provide any theoretical or practical *reasons* for differentiating between the two. The arguments they do advance fall flat.

1. The State and Solicitor General assert that mistakes of substantive law should be treated like mistakes of fact because officers lack the ability "in the field" to obtain definitive guidance regarding supposedly confusing ordinances. Resp. Br. 15, 44; *see also* U.S. Br. 24. This argument is doubly wrong. First, using this case as an example, there is no

reason why Officer Darisse should have waited until the moment of this traffic stop to consider whether North Carolina – like many other states[2] – allows cars to have only one operational brake light. This is a basic question of traffic law that does not depend on any facts an officer might encounter while on patrol. Petr. Br. 21; *see also* NACDL Br. 9-13 (elaborating on this point).

Second, officers in North Carolina have several means of obtaining legal guidance on truly ambiguous substantive law before going on patrol, precisely as they do with respect to other legal issues. For starters, police departments – just like ordinary individuals and businesses – can consult with their lawyers to better understand statutory directives. The North Carolina Department of Justice, for example, has a group of lawyers on call to aid "officers and deputies in making arrests and other law enforcement work." *See* Law Enforcement Liaison, http://www.ncdoj.gov/getdoc/50826608-0a44-4f95-b8d7-695d4cae6419/Law-Enforcement-Liason.aspx. Law enforcement agencies also can obtain opinion letters from offices of attorneys general – something that agencies in North Carolina have done in the past. *See, e.g.*, N.C. Gen. Stat. § 114-2(5); 38 Mass. Prac., Administrative Law &

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[2] *See, e.g., State v. Fikes*, 267 P.3d 1181, 1184 (Ariz. Ct. App. 2011); *Goens v. State*, 943 N.E.2d 829, 833 (Ind. Ct. App. 2011); *State v. Brown*, ___ N.W.2d ___, 2014 WL 3446748, at *9 (Wis. July 16, 2014) (same regarding tail lights); *State v. Catalan*, 2005 WL 2300290, at *4 (Ohio Ct. App. 2005) (same).

Practice § 20 (2014).[3] Law enforcement officials in some states similarly can request declaratory judgments or seek advisory opinions "to settle uncertainty" regarding the scope of criminal laws. 22A Am. Jur. 2d *Declaratory Judgments* §§ 64, 68 (West 2014); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1844-46 (2001) (surveying state practices). Finally, law enforcement agencies can ask legislatures simply to amend or clarify supposedly confusing statutes. Petr. Br. 38-39.

2. The State next contends that it is simply unfair for the Fourth Amendment to presume that officers know the law. "With new and often-changing laws," the State asserts, officers "should not be expected to be legal technicians." Resp. Br. 15 (internal quotation marks and citation omitted). Of course, exactly the same argument could be made with respect to mistakes of non-substantive law. Yet the State studiously declines to "suggest[] that a search or seizure is lawful if based on a mistaken, but reasonable, misunderstanding of the Fourth Amendment" or other non-substantive law. Resp. Br.

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[3] For examples of law enforcement personnel in North Carolina seeking and receiving opinion letters concerning traffic laws, see Opinion, Motor Vehicles; Lights or Reflectors Required on Farm Trailers (Feb. 14, 1992), http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Motor-Vehicles;-Lights-or-Reflectors-Required-on-F.aspx; Opinion, Motor Vehicles; Passing a Stopped School Bus (Apr. 26, 1978), http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Motor-Vehicles;-Passing-a-Stopped-School-Bus.aspx.

31. Exactly the same argument would also apply equally to the citizenry at large. Yet it is a "deeply rooted" tenet of our legal system that ignorance of the law is no excuse. *Cheek v. United States*, 498 U.S. 192, 199 (1991).

The Solicitor General responds to the latter point by saying that all the ignorance canon holds is that "a defendant's *subjective* awareness of the criminal law is not ordinarily relevant to his guilt." U.S. Br. 27 (emphasis added). Not so. The canon presumes that the law is "definite and knowable," and thus refuses to excuse legal mistakes *even when they are objectively reasonable*. *Cheek*, 498 U.S. at 199. The State's and Solicitor General's construction of the Fourth Amendment would thus relieve police officers of a presumption that courts throughout the centuries have thought essential to the rule of law: the presumption that people can learn – and thus may legitimately be held to – the letter of the law, not just objectively unreasonable constructions of it.

3. Lastly, the State asserts that it is "often difficult for courts to distinguish" between mistakes of fact and mistakes of law. Resp. Br. 20-22. Yet again, the State offers no reason why this argument has any greater force with respect to mistakes of substantive law than other kinds of law that even it admits the Fourth Amendment does not tolerate.

Moreover, none of the State's examples demonstrates any special difficulty. The first mistake it references – the speed limit at a particular location, *see State v. McLamb*, 649 S.E.2d 902 (N.C. Ct. App. 2007) – is obviously one of law. Similarly, a mistake about whether a car may be driven with only dealer plates is one of law. *See United States v.*

Pena-Montes, 589 F.3d 1048 (10th Cir. 2009). By contrast, the mistake in *State v. Horton*, 246 P.3d 673 (Idaho Ct. App. 2010) – the officer's unawareness that the letters "RPO" on a license plate often indicate a repossessed vehicle – is plainly a mistake of fact. And the mistake (if it was even a mistake at all) in the only other case that the State or its amici highlight – involving whether a crack in a driver's windshield was excessive, *see United States v. Cashman*, 216 F.3d 582 (7th Cir. 2000), *cited in* Br. of Ass'n of Pros. Att'ys 8-9 – was likewise factual insofar as a reasonable officer could have believed the crack violated the traffic code as properly construed.

The majority of federal circuits and several state courts of last resort have held for many years that the Fourth Amendment does not tolerate mistakes of substantive law. *See* Pet. for Cert. 8-9. The State's inability to identify a single case presenting a hard line-drawing problem is powerful evidence of the majority rule's soundness.

II. Expanding The Relevance Of The Reasonableness Of Mistakes Of Law Beyond The Realm Of Remedies Would Create Serious Administrative Difficulties.

None of the State's or Solicitor General's arguments assuage the concerns petitioner raises with respect to trying to assess the reasonableness of mistakes of law at the rights – rather than at the remedies – stage of litigation. Indeed, the arguments they advance raise still more problems with their proposal.

1. Petitioner's opening brief explains that deeming the reasonableness of mistakes of law

relevant at the rights stage of Fourth Amendment litigation would create problems because this reasonableness inquiry depends in part upon police manuals, training, and custom that vary from locality to locality. Petr. Br. 31-33. The State contends that this reality poses no obstacle to assessing reasonableness at the rights stage because "[t]his Court has never held that such materials are off limits" at that stage. Resp. Br. 35. This is plainly incorrect. This Court has squarely held that "police manuals and standard procedures" cannot inform the legality of traffic stops because they would generate unacceptable variance "from place to place and from time to time." *Whren v. United States*, 517 U.S. 806, 815 (1996).

The Solicitor General, for his part, forsakes reliance on such materials, asserting that "whether an interpretation of law is objectively reasonable turns solely on analysis of the materials that courts would use in discerning the meaning of a statute." U.S. Br. 31. But this position creates the opposite problem: It forecloses assessments of information obviously pertinent to whether an officer acted in good faith. *See, e.g., United States v. Washington*, 455 F.3d 824, 828 (8th Cir. 2006).

Furthermore, neither the State's nor the Solicitor General's proposal comes to grips with other problems their rule would create. What if the prosecution claims that an officer's mistake was reasonable because neighboring jurisdictions forbid certain conduct but the jurisdiction where the stop took place lacks any statute at all on the subject? *See* Petr. Br. 30, 42-43 (discussing cases to this effect). Or what if an intermediate appellate court governing

one part of a state has construed a supposedly confusing traffic ordinance to allow certain conduct but the decision lacks binding effect in the part of the state where the stop occurred? Or what if a local traffic-court judge follows a given interpretation of an ordinance, but that interpretation is never written down and lacks any precedential value? Neither the State nor the Solicitor General offers any way of resolving these questions, which would be sure to arise frequently.

To be sure, if this Court in a later case were to deem the reasonableness of mistakes of substantive law relevant to whether to apply the exclusionary rule, these questions would still arise.[1] But the State and Solicitor General are quite wrong in suggesting (Resp. Br. 34; U.S. Br. 32) that these administrability problems are therefore likely to be a wash. Even if this Court were to hold that the type of good faith at issue here satisfies *Leon*, the "good faith" exception to the exclusionary rule turns not on whether traffic stops (or any other seizure) are unreasonable, but rather on "the culpability of the law enforcement conduct." *Herring v. United States*, 555 U.S. 135,

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[1] The State argues that "[i]f this Court were to hold that investigatory stops may not be based on reasonable mistakes of law, the good-faith exception to the exclusionary rule would apply." Resp. Br. 37. But the applicability of the good-faith exception is not at issue here, and there is no reason for this Court to issue an advisory opinion on the subject – especially in the absence of adversarial briefing. Petitioner thus restricts his analysis to the Fourth Amendment itself, leaving the distinct question of the applicability of the good-faith exception for another case.

143 (2009). This latter inquiry lends itself much more naturally to analyzing officer training and local custom. *See id.* at 145.

2. The problems with the State's and Solicitor General's position only deepen when they attempt to define what would count as a "reasonable" mistake of law under their approach. The State indicates at one point that courts should use the "familiar" standard governing "qualified immunity" determinations to decide whether a mistake is reasonable under the Fourth Amendment – a suggestion that would totally collapse Fourth Amendment rights and remedies. Resp. Br. 16; *see also* Wisconsin Br. 5, 10-11 (advocating same conflation). The State later concedes, however, that "what is objectively reasonable for Fourth Amendment purposes is *not* the same as what is objectively reasonable for qualified immunity purposes." Resp. Br. 31 (emphasis added). So who knows what test the State believes should control here.

The Solicitor General likewise declines to propose any explicit test for assessing "reasonableness" in this context, stating only that a mistake "would not be reasonable if it lacked a foothold in the relevant statute" or "disregarded existing legal authority." U.S. Br. 26. Petitioner does not know exactly what it means to have "a foothold" in a statute. But to the extent it means that a mistake is reasonable whenever it has some basis in the text of the statute, the Solicitor General's proposal would render reasonable mistakes of law anything but the "exceedingly rare" occurrence the State promises (Resp. Br. 17). As Justice Story noted long ago, "[t]here is scarcely any law, which does not

admit of some ingenious doubt." *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833). "Anything that is written may present a problem of meaning The problem derives from the very nature of words." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947); *see also* NACDL Br. 19.

Nor does the Solicitor General's reference to "disregard[ing] existing legal authority" supply any clarity. U.S. Br. 26. What counts as "legal authority"? To the extent such authority includes court decisions, must those decisions be issued by a state high court – or at least by some court with the authority to issue binding precedent? The Solicitor General does not say. Much better, therefore, to continue to assess the reasonableness of mistakes of law – if at all – only at the remedy stage, where courts have the necessary legal tools and settled case law to deal with these sorts of quandaries. *See* Petr Br. 23-33.

III. Even If This Court Were To Import Good-Faith Considerations Into The Fourth Amendment Issue Here, The Holding Below Would Still Be Incorrect.

Even if this Court were to deem good faith pertinent to the legality of traffic stops based on mistakes of substantive criminal law, an objectively reasonable misinterpretation of a never-before-construed statute still would not supply reasonable suspicion. Contrary to the State's and Solicitor General's arguments, tolerating this sort of mistake would establish pernicious incentives for police officers at the expense of individual liberty. It is one thing to tolerate police officers' mistaken reliance on

clear dictates issued by courts or legislatures; it is wholly another to tolerate officers' own legal mistakes, even if supposedly reasonable.

1. The State and the Solicitor General suggest that refusing to condone officers' own reasonable mistakes of substantive law would make police officers unduly "timid" when they "believe[] they ha[ve] witnessed criminal activity." Resp. Br. 42; U.S. Br. 23. Yet they provide no reason why officers who truly believe they have witnessed traffic violations will, in fact, pause before conducting stops. And when officers conduct such stops, the qualified immunity doctrine protects them from liability if they "reasonably but mistakenly conclude that probable cause is present." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *see also* Petr. Br. 25-27.

Indeed, it is critical to appreciate that under the State's and Solicitor General's proposal that the Fourth Amendment condone all objectively reasonable mistakes, even the word "mistake" would be something of a misnomer. Recognizing the necessity of foreswearing any hint that their proposed regime would turn on police officers' subjective beliefs, the State and Solicitor General insist that a traffic stop should be constitutional whenever the stop can be justified according to an "objectively reasonable" construction of a traffic statute. Resp. Br. 11; U.S. Br. 31. It thus would not matter under their rule whether an officer actually believes the conduct he observed violated any law; indeed, an officer might well think the conduct does *not* violate any law. So long as some non-frivolous argument (something, apparently, with some minimal "foothold" in statutory text) could be made

that the conduct is illegal, the Fourth Amendment would invite the officer to initiate a traffic stop. U.S. Br. 26.

The Solicitor General defends such a vast expansion of police authority on the ground that encouraging officers "to start the judicial process in conditions of uncertainty ensures that difficult questions [of substantive law] will be resolved after full and fair proceedings in court." U.S. Br. 8-9. But whatever the merits in general of this arrest-first-and-figure-out-the-law-later approach to law enforcement, the conception does not aid the Solicitor General here. As the State rightly emphasizes, "[t]he officer's mistake of law in this case did not and could not have resulted in petitioner's being charged with the crime of having insufficient brake lights." Resp. Br. 24. Petitioner was charged instead with drug crimes wholly distinct from the mistake of traffic law that set this case in motion.

In other words, the Solicitor General's rule – as the North Carolina Supreme Court's opinion itself illustrates – would accomplish exactly the opposite of what the Solicitor General claims. It would render it unnecessary to resolve the correct meaning of traffic laws; the only salient issue in litigation would be whether there was any objectively reasonable reading of the traffic code that justified the stop. So long as there was, a court would have no need (and perhaps, especially in the case of federal courts, no legitimate judicial authority) to definitively construe the traffic law at issue.

2. The facts of this case, as well as the larger realities of modern law enforcement, confirm that a "reasonable" misinterpretation of traffic law should

not be enough to justify a traffic stop. The State and Solicitor General defend their rule with the image of an officer suddenly confronted with conduct he believes is illegal and faced with a quandary whether to let it go because the officer is not completely sure the conduct is, in fact, unlawful. Resp. Br. 41-42; U.S. Br. 23-24. But that hypothetical has no basis in the record of this case – or in most traffic stops that generate consensual searches and criminal prosecutions.

As Officer Darisse forthrightly testified, he was not suddenly confronted with a car he thought was being unlawfully operated. Rather, this case began while he was conducting criminal interdiction – that is, sitting on the side of a highway "looking for criminal indicators." J.A. 13, 26. After observing Mr. Vasquez drive by with his hands "at a 10 and 2 position, looking straight ahead," J.A. 15, Officer Darisse decided to follow him for some period of time, Pet. App. 29a. Officer Darisse then used the faulty brake light as a reason to conduct a traffic stop and initiate investigatory contact with Mr. Vasquez – and, as it turned out, with petitioner, who was sleeping prone in the back seat. We are here because that contact – and the forty-minute search it occasioned when petitioner said he didn't mind if the officers looked through his vehicle to confirm there was nothing they should know about, Def. Ex. 1 at 11:50, 12:03 – bore fruit.

Petitioner points this out not to disparage using potential traffic violations as pretext for conducting investigatory stops and questioning a vehicle's occupants – much less to contest the legality of this practice. But petitioner wishes this Court to decide

this case with its eyes open. The issue is not so much whether police officers must avert their gaze from seemingly criminal activity that leaps up to meet them, but instead what limitations exist on officers' ability to use wholly innocent conduct on this Nation's roadways as justification for seizing individuals to investigate inarticulable suspicions of impropriety.

Our constitutional system – and the citizenry's respect for it – can tolerate traffic stops whenever an officer observes facts that give rise to a reasonable suspicion that a motorist has actually violated some traffic law. After all, so long as a motorist violates the law, it is hard to complain about being stopped. But when an officer stops someone based upon a mistaken view of the law, that mistake – no matter how understandable – should not justify the stop. Otherwise, the Constitution would be more forgiving toward those entrusted with enforcing the law than those charged with obeying it. No sensible regime would countenance that incongruity.

CONCLUSION

For the foregoing reasons, the judgment of the North Carolina Supreme Court should be reversed.

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August 20, 2014

AMICUS CURIAE BRIEF

No. 13-604

In the Supreme Court of the United States

NICHOLAS BRADY HEIEN, PETITIONER

v.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a law enforcement officer's reasonable but mistaken view of the law can support a traffic stop under the Fourth Amendment.

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In the Supreme Court of the United States

No. 13-604

NICHOLAS BRADY HEIEN, PETITIONER

v.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a law enforcement officer violates the Fourth Amendment by performing a traffic stop based on a reasonable but mistaken interpretation of the law. Federal officers perform traffic stops, and evidence of federal crimes obtained through such stops is used in federal prosecutions. Accordingly, the United States has a substantial interest in the resolution of this question.

STATEMENT

1. a. On April 29, 2009, Sergeant Matt Darisse, a 20-year veteran of a North Carolina sheriff's department, J.A. 13-14, stopped the Ford Escort in which petitioner was a passenger after observing that one of the car's brake lights was not functional. Pet. App. 2a. After stopping the car, Sergeant Darisse told the

driver, Maynor Javier Vasquez, the reason for the stop. *Ibid.* He checked Vasquez's driver's license and the car's registration and issued a warning ticket. *Ibid.* During the stop, Sergeant Darisse began to suspect that the Escort might contain contraband. *Ibid.* Vasquez appeared nervous. *Id.* at 29a-30a. When questioned, Vasquez and petitioner gave conflicting information about their destination. *Id.* at 2a-3a.

Sergeant Darisse asked Vasquez for permission to search the Escort. Pet. App. 3a. Vasquez said he had no objection, but that the car belonged to petitioner. Sergeant Darisse then obtained petitioner's consent. *Ibid.* A search revealed cocaine. *Ibid.* Petitioner and Vasquez were arrested on drug trafficking charges. *Ibid.*

b. North Carolina's provisions bearing on brake lights had not been authoritatively construed when petitioner's car was stopped. The first provision requires that "[e]very motor vehicle * * * have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle." N.C. Gen. Stat. § 20-129(d) (2009).

A second provision mandates that any car operated on a state highway "be equipped with a stop lamp on the rear of the vehicle" that "may be incorporated into a unit with one or more other rear lamps." N.C. Gen. Stat. § 20-129(g) (2009). The stop lamp must "be actuated upon application of the service (foot) brake" and must "display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight." *Ibid.* An additional provision requires that

rear "[b]rake lights" have red lenses. *Id.* § 20-129.1(9).

2. After his arrest, petitioner moved to suppress the cocaine seized from his vehicle on Fourth Amendment grounds. Pet. App. 3a. The trial court denied the suppression motion, concluding, as relevant here, that the stop of petitioner's vehicle was permissible because Sergeant Darisse had a "reasonable and articulable suspicion that the subject vehicle and the driver were violating the laws of [North Carolina] by operating a motor vehicle without a properly functioning brake light." J.A. 8-9.

Petitioner then entered a conditional guilty plea to two counts of attempted trafficking in cocaine, while reserving his right to appeal the denial of his suppression motion. Pet. App. 31a.

3. The state court of appeals reversed petitioner's conviction, concluding that Sergeant Darisse and the court below had misunderstood North Carolina traffic law and that the mistake rendered the stop of petitioner's car unconstitutional. Pet. App. 29a-40a. For the first time, the court concluded that a broken brake light did not violate North Carolina law so long as another brake light functioned. *Id.* at 39a. The court emphasized that the mandatory brake-light provision demanded only "a stop lamp" and described the method in which "[t]he stop lamp" should be actuated. *Id.* at 34a (quoting N.C. Gen. Stat. § 20-129(g) (2009) (emphasis omitted)). The court concluded that the separate provision requiring that all "rear lamps" be kept in working order did not apply to brake lights in the rear of the car. *Id.* at 36a.

The state court of appeals held that because Sergeant Darisse had stopped petitioner's car for conduct

that the court ultimately concluded was not criminal, "the justification for the stop was objectively unreasonable, and the stop violated [petitioner's] Fourth Amendment rights." Pet. App. 39a. The court vacated petitioner's conviction and ordered the suppression of the cocaine seized from petitioner's car. *Id.* at 40a.

4. a. The state supreme court reversed. Pet. App. 1a-20a. Because the State had sought review only of the appellate court's Fourth Amendment holding, the state supreme court proceeded from the premise that North Carolina law required only a single working brake light. *Id.* at 7a. The court concluded, however, that because Sergeant Darisse's mistake of law had been reasonable, the stop of petitioner's car did not violate the Fourth Amendment. *Id.* at 20a.

The state supreme court's starting point was that the "primary command of the Fourth Amendment" is "that law enforcement agents act reasonably." Pet. App. 13a (citing *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979)). It is reasonable, the court concluded, for officers to make investigative stops when they observe conduct that they reasonably understand to violate the law, even if their understandings later turn out to be mistaken. *Id.* at 13a-15a. The court found a strong public interest in this rule: "[B]ecause we are particularly concerned for maintaining safe roadways, we do not want to discourage our police officers from conducting stops for perceived traffic violations." *Id.* at 14a. A contrary approach, the court reasoned, would "undermine our officers' important efforts in keeping our roads safe" because it would "require our law enforcement officers to narrowly interpret our traffic safety statutes when deciding whether to conduct a stop." *Ibid.*

The state supreme court acknowledged that citizens have an interest in avoiding mistaken traffic stops, but it found that the interest is not strong, because the intrusion of a traffic stop is modest. Pet. App. 14a. Indeed, the court reasoned that "most motorists would actually prefer to learn that a safety device on their vehicle is not functioning properly." *Ibid.* The court accordingly concluded that a reasonable but mistaken construction of the traffic law supplies a valid basis for a car stop, "particularly when judged against society's countervailing interest in keeping its road safe." *Ibid.*

The state supreme court found this result supported by decisions emphasizing that the reasonable suspicion standard requires only "some minimal level of objective justification" for a car stop. Pet. App. 16a (quoting *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989)). The court reasoned that "[t]o require our law enforcement officers to accurately forecast how a reviewing court will interpret the substantive law at issue" would not simply require "some minimal level of objective justification" from officers but would instead "mandate that they be omniscient." *Ibid.*

Applying its constitutional holding, the state supreme court concluded that the stop of petitioner's car was valid because it had been reasonable to interpret North Carolina law to require that all brake lights be in working condition. Pet. App. 18a-19a. After reviewing North Carolina's provisions on brake lights and noting the absence of any contrary authority, the court stated that because "Sergeant Darisse could have reasonably believed that he witnessed a violation of [the State's] motor vehicle laws when he observed that the Escort had an improperly functioning brake

light," Sergeant Darisse had "reasonable, articulable suspicion to conduct the traffic stop of the Escort in this case." *Id.* at 19a. The court reversed the suppression order and remanded the case for consideration of petitioner's separate challenge to his consent to the car search. *Id.* at 20a.

b. Judge Hudson dissented, joined by two other justices. Pet. App. 20a-28a. The dissenting justices found "no doubt" that Sergeant Darisse's interpretation of state law had been reasonable. *Id.* at 20a. Indeed, Judge Hudson described the state court of appeals' construction of the law as "surprising," and he surmised that before the appellate decision, "most citizens of this state" would have "believed that a malfunctioning brake light represented legal grounds for a traffic stop and a citation." *Ibid.* The dissenters also concluded that "[*o*]*f course*" it was "reasonable that an officer would pull over a vehicle for a malfunctioning brake light." *Id.* at 22a. Nonetheless, the dissenters concluded that the stop was an unreasonable seizure under the Fourth Amendment, expressing concern that a contrary rule would make the validity of stops depend on "subjective motivation," *ibid.*, raise separation of powers problems, and forgive even unreasonable mistakes, such as legal interpretations based on "simple misreadings" or "improper trainings," *id.* at 27a.

5. On remand, the state court of appeals rejected petitioner's challenge to his consent to search and reinstated his convictions. Pet. App. 42a-56a. The state supreme court affirmed in a per curiam order. *Id.* at 41a.

SUMMARY OF ARGUMENT

When a law enforcement officer reasonably believes that a crime has been committed, but uncertainties of fact or law remain, the Fourth Amendment allows the officer to make a seizure to start the judicial process, thereby ensuring that contested questions of fact and unsettled questions of law are decided after full and fair proceedings in a court.

A. Under the Fourth Amendment, seizures are constitutional when they are reasonable. Whether a seizure is reasonable depends on a balancing of governmental and private interests at the time the seizure is made. The balancing is not in doubt for certain seizures. Under the probable cause standard, an officer may make an arrest based on a "fair probability" or "substantial chance" of criminal activity, in light of the information available at the time of the arrest. And under the reasonable suspicion standard, an officer may make a car stop or briefly detain a person based on the lesser showing of a minimal level of objective justification. By allowing seizures to start the judicial process in cases of uncertainty—even if officers' reasonable judgments are later deemed incorrect—these standards ensure that uncertain cases may be brought before the courts to be decided based on fact-finding and legal briefing, rather than pretermitted by officers in the field.

B. Decisions from the Founding forward establish that these standards allow officers to make the seizures that enable them to bring cases of legal uncertainty before the courts, so long as they act reasonably. The Court held as much in its earliest cases construing the probable cause standard. In 1809, Chief Justice Marshall determined that officers had proba-

ble cause for a seizure despite a mistake of law, explaining that "[a] doubt as to the true construction of the *law* is as reasonable a cause for seizure as a doubt respecting the fact." *United States* v. *Riddle*, 9 U.S. (5 Cranch) 311, 313. Later cases routinely found probable cause when officers acted based on reasonable but ultimately mistaken readings of the law.

This Court adopted that principle in the constitutional context in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979). The Court in that case found that an arrest was constitutionally valid under the probable cause standard although the criminal provision underlying the arrest was later determined to be unconstitutional. Because the arresting officer had probable cause to believe that a crime had occurred in light of the statute, the Court concluded, the officer had satisfied "the constitutional prerequisite for an arrest." *Id.* at 37. *DeFillippo* establishes that an arrest based on a reasonable, but mistaken, understanding of the law meets the standards of the Fourth Amendment.

C. Permitting officers to perform car stops when they observe conduct they reasonably believe to violate the law properly balances public and private interests. Petitioner does not dispute that these interests are properly balanced when an officer performs a car stop based on a reasonable view of uncertain facts, even if the view turns out to be mistaken. The same interests support permitting stops when the law is uncertain. Car stops intrude on private interests, but they do so in a modest manner. And the public has strong interests in permitting officers to start the judicial process in conditions of uncertainty, so long as they act reasonably in believing that criminal activity is afoot. Doing so ensures that difficult questions will

be resolved after full and fair proceedings in court, not finally decided by officers in the field. And it ensures that when officers' reasonable views are correct, criminal activity and other dangerous conditions are appropriately addressed.

D. The constitutional standard is compatible with maxims of statutory construction used to determine defendants' substantive liability. Permitting officers to make seizures that start the judicial process in cases where the law is not yet settled does not contradict the maxim that "ignorance of the law is no excuse," because it does not make an officer's duties turn on his subjective awareness of the law. Rather, officers may make a stop or arrest to start the judicial process only when, if their view of the law turns out to be mistaken, the law was objectively uncertain and the officers' position was reasonable. Similarly, permitting officers to start the judicial process based on a substantial probability of criminal activity ensures accurate application of the rule of lenity and void-for-vagueness doctrines by judges after adversarial briefing, instead of by officers on the fly.

E. This Court's recent good-faith cases have not overruled its probable cause or reasonable suspicion decisions. Those decisions concluded that the drastic exclusionary remedy is unwarranted in the absence of significant wrongful conduct. But this Court has reaffirmed, in applying the good-faith exception, that some reasonable mistakes do not violate the Fourth Amendment in the first place.

F. When the officer in this case saw what he understood to be a vehicle on the road in a dangerous and illegal condition, he was permitted to stop the car, because his construction of the traffic law was a rea-

sonable one. The state supreme court squarely held that the officer's view of state law was reasonable, and its assessment of its own law should not be lightly disturbed. In any event, the court was correct, because North Carolina's provisions permitting brake lights to be "incorporated into a unit with one or more other rear lamps," N.C. Gen. Stat. § 20-129(g) (2009), and mandating that "all originally equipped rear lamps" be "in good working order," *id.* § 20-129(d), strongly suggest that rear brake lamps are "originally equipped rear lamps" that must be kept in working condition. Because the officer in this case acted on a reasonable view of the law, the Constitution did not bar the modest intrusion of a vehicle stop.

ARGUMENT

THE STOP OF PETITIONER'S CAR WAS REASONABLE UNDER THE FOURTH AMENDMENT

A. An Officer Who Reasonably Believes He Has Observed Conduct That Violates The Law May Perform A Car Stop, Even If His Belief Turns Out To Have Been Mistaken

Because it protects against "unreasonable searches and seizures," the "ultimate touchstone of the Fourth Amendment is reasonableness." *Riley* v. *California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (internal quotation marks omitted)). Absent more precise Founding-era guidance, whether a seizure is reasonable depends on a "balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests * * * at stake." *Plumhoff* v. *Rickard*, 134 S. Ct.

2012, 2020 (2014) (citation omitted); see also, *e.g.*, *United States* v. *Knights*, 534 U.S. 112, 119 (2001).

The outcome of that balancing is "not in doubt" for certain types of seizures. *Whren* v. *United States*, 517 U.S. 806, 817 (1996). It is constitutionally reasonable for officers to make an arrest or other temporary seizure to start the judicial process when they have probable cause to believe that a suspect has committed a crime. See, *e.g.*, *ibid.*; *Carroll* v. *United States*, 267 U.S. 132, 157 (1925) (compiling historical authorities). That standard requires only a "fair probability" or "substantial chance" of criminal activity. *Illinois* v. *Gates*, 462 U.S. 213, 238, 244 n.13 (1983). The assessment is made "in light of the information available to [officers] at the time they acted." *Maryland* v. *Garrison*, 480 U.S. 79, 85 (1987); see also *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Probable cause thus allows for "the mistakes * * * of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). When an officer reasonably concludes that a crime has occurred but turns out later to have been incorrect, his mistake does not render the initial intrusion unconstitutional because only "sufficient probability, not certainty" of criminal activity is required. *Hill* v. *California*, 401 U.S. 797, 804 (1971).

The Court has explained that this toleration for reasonable mistakes "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975). By permitting officers to make initial seizures that start the judicial process in cases of uncertainty, the probable cause standard allows conduct reflecting a substantial likelihood of a

criminal violation to be brought before the courts for adjudication based on fact-finding and legal briefing. In contrast, a rule under which officers act unconstitutionally when their reasonable beliefs concerning the existence of crimes later turn out to be incorrect would "unduly hamper law enforcement," *ibid.* (citation omitted), by deterring officers from starting the judicial process in the face of any *ex ante* uncertainty.

The reasonable suspicion standard applicable to car stops and other brief detentions also allows for reasonable mistakes. Because car stops and other brief detentions are less intrusive than arrests, they may be conducted based only on reasonable suspicion of criminal activity, which requires "'obviously less' than is necessary for probable cause." *Navarette* v. *California*, 134 S. Ct. 1683, 1687 (2014) (citation omitted). Reasonable suspicion requires only "a particularized and objective basis for suspecting the particular person stopped of criminal activity," *ibid.*, or "some minimal level of objective justification," *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) (citations omitted). The "only difference" between probable cause and reasonable suspicion is "the level of suspicion that must be established." *Alabama* v. *White*, 496 U.S. 325, 330-331 (1990).

B. Seizures Based On Reasonable But Mistaken Views Of The Law Have Long Been Understood To Satisfy Probable Cause

Because the choice between reasonable interpretations of the law should be made by courts after full and fair proceedings, courts since the Founding have ruled that officers are justified in making the brief seizures that start the judicial process when they act based on reasonable interpretations of the law, even

when their reasonable views later turn out to be mistaken. That Founding-era understanding carries great weight in determining what is "reasonable" under the Fourth Amendment. See, *e.g.*, *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995).

1. Reasonable but ultimately mistaken views of the law have been understood since the Founding to satisfy not simply the low bar of reasonable suspicion but the higher bar of probable cause. The earliest cases construing probable cause arose under statutes that authorized courts to issue certificates indemnifying customs officers and revenue officials against suits for damages. See, *e.g.*, Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695 (1799 Collections Act); Act of July 31, 1789, ch. 5, § 36, 1 Stat. 47 (1789 Collections Act); Act of Feb. 24, 1807, ch. 19, § 1, 2 Stat. 422 (Act of 1807). The certificates were to be issued on a showing of "reasonable cause"—a synonym for probable cause. 1789 Collections Act § 36, 1 Stat. 47; Act of 1807 § 1, 2 Stat. 422; see *Stacey* v. *Emery*, 97 U.S. 642, 646 (1878) (noting that reasonable cause and probable cause are synonyms); see also, *e.g.*, *United States* v. *Riddle*, 9 U.S. (5 Cranch) 311, 313 (1809); *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 348 (1813). These statutes invoked legal terms of art. Probable cause had "a fixed and well known meaning," Chief Justice Marshall explained, and it was "[i]n this, its legal sense, the Court must understand the term to have been used by Congress." *Locke*, 11 U.S. (7 Cranch) at 348.

This Court has accordingly relied on the Founding-era cases under these statutes to determine the meaning of probable cause as it was used in the Fourth Amendment. The preeminent constitutional cases

concerning probable cause have cited decisions under these statutes to give meaning to the constitutional standard. See, *e.g.*, *Brinegar*, 338 U.S. at 175-176 & nn. 14, 15 (relying on formulation of probable cause in *Locke* and similar formulation in *Stacey*); *Carroll*, 267 U.S. at 159-162 (relying on formulations of probable cause in four cases arising under early forfeiture statutes); *Gates*, 462 U.S. at 235 (relying on formulation in *Locke*); see also *Virginia* v. *Moore*, 553 U.S. 164, 168 (2008) (noting Court "look[s] to the statutes * * * of the founding era to determine the norms that the Fourth Amendment was meant to preserve").[1]

The cases leave no doubt that at the time the Fourth Amendment was written, the probable cause standard permitted law enforcement officers to make the initial seizures that start the judicial process based on conduct they reasonably understood to be illegal, even if the officers were ultimately proven mistaken in their reading of the law. This Court first reached that holding in *United States* v. *Riddle*, *supra*. There, a customs collector seized certain goods because he believed that a merchant who arranged their importation had violated a customs statute by creating a set of false invoices, even though the consignee declared the goods' true value to customs offi-

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[1] Because the early customs seizure statutes were enacted virtually contemporaneously with the passage of the Fourth Amendment, scholars have treated these statutes as "nothing less than a statutory exegesis * * * on the Fourth Amendment." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* 737-738 (2009); see also, *e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 766-767 (1994) (using seizure provisions of 1789 Collections Act and similar statutes in 1790, 1793, and 1799 to illuminate meaning of Fourth Amendment).

cials. 9 U.S. (5 Cranch) at 311. This Court held that the collector was incorrect to believe the false invoices violated the statute, concluding that "[t]he law did not intend to punish the *intention*, but the *attempt* to defraud the revenue." *Id.* at 312. Nevertheless, Chief Justice Marshall concluded that the customs inspector was entitled to a "certificate of probable cause" for the seizure because "the construction of the law was liable to some question." *Id.* at 313. "A doubt as to the true construction of the *law*," Chief Justice Marshall explained, "is as reasonable a cause for seizure as a doubt respecting the fact." *Ibid.*

Chief Justice Marshall and Justice Story each found probable cause in cases involving mistakes of law in a pair of cases decided three years later. In *Schooner Paulina's Cargo* v. *United States*, 11 U.S. (7 Cranch) 52 (1812) (*The Paulina)* and *The Friendship*, 9 F. Cas. 825 (C.C.D. Mass. 1812) (No. 5,125), customs inspectors seized ships and sought to forfeit their cargo because the ships had been loaded with goods without the permission of a revenue officer. After a lengthy statutory analysis, Chief Justice Marshall concluded for this Court that the statute at issue did not authorize officers to seize ships or forfeit cargo on this ground. *The Paulina*, 11 U.S. (7 Cranch) at 68. This Court nonetheless "certified that there was probable cause of seizure." *Ibid.*

Justice Story explained the logic of this decision when he issued a certificate of probable cause in *The Friendship* to inspectors who seized a ship based on the same legal theory rejected in *The Paulina*. Justice Story found that under the logic of *The Paulina*, those inspectors, too, were entitled to a certificate of probable cause. *The Friendship*, 9 F. Cas. at 826. At

the time of the seizure, he explained, interpretation of the relevant provision had "been a vexata questio; judges in different districts have held opposite opinions, and until last February term of the supreme court, the question was still floating." *Ibid.* The Court's issuance of a certificate of reasonable cause in *The Paulina* "held in effect, that this act was so doubtful in construction, that collectors acting upon it ought to have the benefit of the certificate." *Ibid.* Since the seizure of The Friendship had been made under the identical construction of unsettled law, Justice Story found himself "bound by the decision" in *The Paulina* "to certify that there was reasonable cause of seizure." *Ibid.*

Decisions thereafter routinely found probable cause in cases in which officers acted on reasonable but mistaken views of unsettled legal questions. For instance, a Massachusetts court found that while a seizure was erroneous under a "true interpretation of law," because the court was embracing "a new interpretation, and the officer may reasonably have been mistaken," the officer was entitled to a certificate of reasonable cause. *United States* v. *Twenty-Six Diamond Rings*, 28 F. Cas. 288, 290 (D.C.D. Mass. 1855) (No. 16,572). Similarly, a New York court found an officer was mistaken in his reading of a statute, but nonetheless issued a certificate of probable cause, explaining that the legal question had "presented points of considerable intricacy and difficulty." *United States* v. *The Recorder,* 27 F. Cas. 723, 723-724 (C.C.S.D.N.Y. 1849) (No. 16,130). And a Rhode Island court issued a certificate of probable cause because "real doubts exist[ed] as to the true construction of the law" and "the forfeiture was overruled only after a

careful scrutiny and serious difficulty in construing the law supposed to be violated." *United States* v. *The Reindeer*, 27 F Cas. 758, 768 (C.C.D.R.I. 1848) (No. 16,145).

Petitioner identifies no Founding-era cases establishing that Chief Justice Marshall, Justice Story, and their successors misunderstood probable cause. While petitioner identifies a smattering of state tort authority beginning in the mid-19th century that declined to excuse trespasses based on reasonable mistakes of law (Pet. Br. 15-16), isolated tort decisions from that period do not undercut the long line of cases from the Founding onward defining probable cause to allow reasonable mistakes of law. See, *e.g.*, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 341 (2001) (noting that Founding-era history was not undercut by "several 19th-century decisions" evincing different view).

2. a. This Court adopted the historical conception of probable cause in the constitutional context in *Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979), where it held that an officer had probable cause for an arrest despite a reasonable mistake of law. In *DeFillippo*, an officer arrested a man for violating a municipal law requiring certain persons to identify themselves to police. This Court concluded that the arrest was constitutionally valid, even though the municipal law was ultimately held void because it was unconstitutionally vague. *Id.* at 33, 37, 40.

The Court's holding rested on a finding of probable cause. The Court explained that probable cause requires only "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect

has committed, is committing, or is about to commit an offense." *DeFillippo*, 443 U.S. at 37. Judged against that standard, this Court found "abundant probable cause to satisfy the constitutional prerequisite for an arrest." *Ibid.* Noting that the existence of the statute defining a crime could be seen as among the factors "pertain[ing] to the 'facts and circumstances' we hold constitute[] probable cause for arrest," the Court concluded that once the defendant refused to identify himself to an officer, "the officer had probable cause to believe [the defendant] was committing an offense in his presence." *Id.* at 40. The Court emphasized that the officer's understanding of the law was reasonable, explaining that "[a] prudent officer * * * should not have been required to anticipate that a court would later hold the ordinance unconstitutional." *Id.* at 37-38. It distinguished cases in which "any person of reasonable prudence" would have known the statute was invalid and thus known the arrestee's conduct to be innocent. *Id.* at 38. *DeFillippo* establishes that when officers have a reasonable, albeit incorrect, conception of what conduct is illegal, they may nevertheless have the "probable cause to satisfy the constitutional prerequisite for an arrest," *id.* at 37—a level of proof greater than that required for the vehicle stop here.

b. Petitioner's efforts to distinguish *DeFillippo* are unavailing. Petitioner does not dispute that the arrest in *DeFillippo*—like the seizure at issue here—was based on a mistake of law. While the arresting officer relied on "a presumptively valid ordinance," 443 U.S. at 37, the later judicial declaration that the statute was unconstitutionally vague established that the state law did not actually define criminal conduct.

See, *e.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) (applying "void-for-vagueness doctrine" to invalidate a stop-and-identify statute that provided insufficient clarity).

Petitioner instead proposes that *DeFillippo* should be read as a case concerning Fourth Amendment remedies, because the "true focus" of the case "was on the exclusionary rule." Pet. Br. 28. As set out above, the decision belies this contention. Not only did *DeFillippo* hold that the arrest at issue had been supported by "abundant probable cause to satisfy the constitutional prerequisite for an arrest," 443 U.S. at 37, but the bulk of its reasoning focused on probable cause, *id.* at 36-40. Its discussion of the costs of applying the exclusionary rule is a sentence in a footnote. *Id.* at 38 n.3.

Subsequent decisions reaffirm *DeFillippo*'s status as a Fourth Amendment holding. The Term after *DeFillippo* was decided, this Court explained that the case had "held that the Fourth and Fourteenth Amendments had not been violated" by the arrest at issue in *DeFillippo* because the arrest had been supported by probable cause. *Ybarra* v. *Illinois*, 444 U.S. 85, 96 n.11 (1979). Then, in a seminal exclusionary rule decision, the Court described *DeFillippo* as one of a number of "decisions *not* involving the scope of the [exclusionary] rule itself" that had nonetheless paid "attention to the purposes underlying the scope of the exclusionary rule." *United States* v. *Leon*, 468 U.S. 897, 911 (1984) (emphasis added). Petitioner performs surgery to claim that sentence in *Leon* characterized *DeFillippo* "as a case only about suppression" (Br. 28), by quoting the Court's observation that *DeFillippo* paid attention to the exclusionary rule (Br.

29), while omitting the portion of the same sentence stating that the holding in *DeFillippo* was one "*not* involving" the "scope of the rule itself." 468 U.S. at 911 (emphasis added). And as recently as last year, this Court gave *DeFillippo* the same reading, concluding that the portion of that decision upholding a search incident to arrest was an application of the principle that "[t]he fact of a lawful arrest, standing alone, authorizes a search." *Maryland* v. *King*, 133 S. Ct. 1958, 1971 (2013) (citation omitted).

Petitioner finally suggests that *DeFillippo*'s holding as to probable cause should be disregarded as a "relic," because the case arose at "an earlier time, when this Court treated the issue whether to suppress evidence as 'synonymous with' the issue whether the Fourth Amendment was violated." Pet. Br. 28 (quoting *Arizona* v. *Evans*, 514 U.S. 1, 13 (1995)). Petitioner misunderstands the cases described in *Evans*. As *Evans* makes clear, the error of certain decisions up until the mid-1970s was that they "reflexive[ly]" applied suppression without considering the remedy's costs. See *Evans*, 514 U.S. at 13; *Davis* v. *United States*, 131 S. Ct. 2419, 2427 (2011). Those cases' failure to weigh costs and benefits, see *ibid.*, diminishes the precedential force of their remedial holdings, not their merits holdings. See *Evans*, 514 U.S. at 13 (concluding that case in this period "clearly retains relevance in determining whether police officers have violated the Fourth Amendment" but "its precedential value regarding application of the exclusionary rule is dubious").

In any event, this Court separated Fourth Amendment rights from remedies well before *DeFillippo*. See *Davis*, 131 S. Ct. at 2427; *Evans*, 514 U.S. at 13.

As this Court chronicled in *Davis* and *Evans*, while cases had reflexively applied the exclusionary rule until "[a]s late as" 1971, decisions beginning in the mid-1970s "rejected this reflexive application of the exclusionary rule." *Ibid.* (citing cases beginning in 1974). These cases treated the question whether the exclusionary rule should be applied as separate from the question whether a Fourth Amendment violation occurred. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433, 453 (1976); *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *id.* at 496-502 (Burger, C.J., concurring); *Brown* v. *Illinois*, 422 U.S. 590, 606 (1975) (Powell, J., concurring in part); *United States* v. *Calandra*, 414 U.S. 338, 351-352 (1974).

Indeed, in *DeFillippo* itself, rights and remedies were sharply defined as separate issues before the Court. The State made discrete arguments that DeFillippo had been subject to a valid arrest, see Pet. Br. at 6-13, *DeFillippo*, *supra* (No. 77-1680) (1978 WL 207262), and in the alternative, that the exclusionary rule should not apply to any violation, *id.* at 14-21. See also, *e.g.*, ACLU Amicus Br. at 9, 18, *DeFillippo*, *supra* (No. 77-1680) (1978 WL 207265) (noting State's "first argument concerns the legality of the arrest itself" and "second argument concerns the applicability of the exclusionary rule"). That the *DeFillippo* Court found no violation at all even though an exclusionary rule ground was presented as an alternative basis for decision strips plausibility from the claim that *DeFillippo*'s Fourth Amendment holding was mere inadvertence.

C. The Settled Jurisprudence Allowing Seizures Based On Reasonable But Mistaken Understandings Of Law Properly Balances Fourth Amendment Interests

1. While the cases stretching back to the Founding settle the question presented here, see *Moore*, 553 U.S. at 168, the rule that "[a] doubt as to the true construction of the *law* is as reasonable a cause for seizure as a doubt respecting the fact," *Riddle*, 9 U.S. (5 Cranch) at 313, would also be justified in the absence of these authorities, because it properly balances the interests that underlie the Fourth Amendment. See, *e.g.*, *Plumhoff*, 134 S. Ct. at 2020; *Moore*, 553 U.S. at 171.

It is well-settled—and not disputed by petitioner—that a vehicle stop (or even arrest) can be valid despite some "doubt respecting the fact." *Riddle*, 9 U.S. (5 Cranch) at 313. Car stops intrude on private interests—albeit in a manner this Court has described as "modest," *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975), "minimal," *id.* at 881, and "slight," *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990). But because of the strong public interest in bringing suspects into court when criminal conduct is probable but not certain, a rule that allows for reasonable mistakes "afford[s] the best compromise that has been found for accommodating" public and private interests. *Brinegar*, 338 U.S. at 176.

The same balancing of interests justifies a stop when an officer's belief about the substantive law is reasonable, but may be mistaken. On the private-interest side of the balance, the intrusion of a vehicle stop remains a modest one. Indeed, as the court below observed, many motorists would prefer to be briefly stopped when officers witness what they rea-

sonably believe to be a violation of traffic provisions that are aimed at protecting driver and passenger safety. Pet. App. 14a.

On the other side of the balance, the same interests that permit officers to start the judicial process based on a "substantial chance of criminal activity," *Gates*, 462 U.S. at 244 n.13, when uncertainty exists about the facts support starting the judicial process when uncertainty exists about the substantive law. An initial seizure ensures that unsettled questions about the scope of criminal statutes will be resolved after full and fair legal proceedings, rather than pretermitted by officers on the fly. In addition, such seizures ensure that when officers' reasonable views of the law are correct, criminal activity is appropriately sanctioned and dangerous conditions ameliorated—rather than left unaddressed because officers could be confident only of a substantial chance of criminal activity.

In contrast, a rule that found a constitutional violation whenever an officer made even a reasonable mistake of law would disserve public interests in precisely the same way as a rule that found a constitutional violation based on even a reasonable mistake of fact. Under either rule, officers seeking to avoid constitutional violations would be deterred from making arrests or stops in cases where they reasonably believed they had witnessed criminal activity, simply because they recognized some uncertainty as to the law or the facts. This would foreclose the judicial proceedings that can resolve uncertain questions with a higher level of accuracy than officers' on-the-spot judgments. And criminal prohibitions would go unenforced even in cases where an officer's reasonable view would ultimately prevail, simply because an officer could not

rule out, *ex ante*, the possibility that a court or fact-finder would take a different view.

2. a. Petitioner's arguments for differential treatment of mistakes of law and fact are unsound. Petitioner suggests (Br. 21) that the standards of probable cause and reasonable suspicion should allow for mistakes of fact, but not of law, because "[i]n contrast to factual inferences, legal analysis is not something that officers must do on the fly." But situations presenting unexpected factual circumstances may also present unsettled legal questions that require quick action. Thus, the Court has treated the reality that probable-cause decisions are made "in the midst and haste of a criminal investigation" as a reason not to require high levels of refinement in officers' legal conclusions, not just their factual ones. *Gates*, 462 U.S. at 235 (citation omitted) (declining to adopt complex standard for probable cause because legal rule must be applied in fast-developing circumstances); see also *Atwater*, 532 U.S. at 347 (declining to require consideration of state penalty schemes in arrest decisions because "the Fourth Amendment has to be applied on the spur (and in the heat) of the moment").

Further, officers' ability to familiarize themselves with the law does not eliminate uncertainty about the meaning of legal provisions. When a provision has not yet been authoritatively construed, uncertainty as to its meaning may remain no matter how much an officer studies and consults. Petitioner identifies no ready means for an officer witnessing an apparent traffic violation to obtain legal certainty before acting. Officers cannot, for example, file declaratory judgment actions to obtain definitive constructions of never-before-construed criminal laws. Rather, the time-

honored mechanism to place the issue before the court is to make the stop (or arrest) and let the judicial process begin.

b. Petitioner also argues (Br. 21) that it is less appropriate to allow for reasonable mistakes of law than for reasonable mistakes of fact because unlike factual assessments of criminal conduct, legal analysis is not something "that officers are better trained than the courts to undertake." But it makes little sense for officers to be permitted mistakes in the area in which officers are specially trained, while "mandat[ing] that they be omniscient" in areas in which they are not expert. Pet. App. 16a. This Court has recognized as much, emphasizing that officers cannot be expected to act as expert "legal technicians," *Navarette*, 134 S. Ct. at 1690 (quoting *Ornelas* v. *United States*, 517 U.S. 690, 695 (1996)), and that standards of probable cause must be defined so that they can be applied "on the basis of nontechnical, common-sense judgments of laymen." *Gates*, 462 U.S. at 235-236; see also *Atwater*, 532 U.S. at 348; *Moore*, 553 U.S. at 175-176. That is a logical approach. Because judges, rather than officers, are best suited to resolve legal questions, it is particularly sensible to have legal questions open to reasonable disagreement settled by courts after briefing, rather than being decided finally by officers in the field.

c. The dissent below expressed a separate concern that the decision of the state supreme court would excuse mistakes of law not only "when the Court of Appeals divines a novel interpretation of a statute, but also" when mistakes "arise from simple misreadings of statutes, improper trainings, or ignorance of recent legislative changes." Pet. App. 27a (Hudson, J., dis-

senting). But the requirement that mistakes of law be reasonable prevents that result. While an officer's approach to an open legal question may be reasonable when "overruled only after a careful scrutiny and serious difficulty in construing the law," see *The Reindeer*, 27 F. Cas. at 768, or when the officer took one of the logical views on a "vexata questio" on which even judges disagreed, see *The Friendship*, 9 F. Cas. at 826, an approach would not be reasonable if it lacked a foothold in the relevant statute, see, *e.g.*, *United States* v. *$45,000.00 in U.S. Currency*, 749 F.3d 709, 716-720 (8th Cir. 2014), or disregarded existing legal authority, see, *e.g.*, *Twenty-Six Diamond Rings*, 28 F. Cas. at 290 (explaining that "if a second seizure be made, under similar circumstances" after legal issue was settled, court "shall not feel bound to grant a certificate" of probable cause). Because the Fourth Amendment tolerates only "the mistakes * * * of reasonable men," *Brinegar*, 338 U.S. at 176, unreasonable mistakes of both fact and substantive law remain unconstitutional.

D. This Court Should Not Rework The Fourth Amendment Based On Analogies To Other Areas Of Law

Petitioner invokes various maxims for determining substantive criminal liability to argue for a different Fourth Amendment approach. But these maxims are fully compatible with the probable cause and reasonable suspicion standards, which serve the distinctive purpose of ensuring that possible criminal activity may be investigated and restrained so that ultimate liability can be adjudicated in full and fair judicial hearings.

1. Petitioner first notes that courts have applied the principle that "ignorance of the law is no excuse"

in determining criminal liability. Pet. Br. 17-18 (citation omitted). While subject to many exceptions, that maxim holds that a defendant's subjective awareness of the criminal law is not ordinarily relevant to his guilt. See generally 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.6(a), at 394 (2d ed. 2003). As a result, criminal liability does not depend on proving a mental state that would be exceedingly difficult to establish. See, *e.g.*, 1 John Austin, *Lectures on Jurisprudence* 498 (rev. 3d ed. 1869); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. Pa. L. Rev. 35, 41 (1939). The maxim applies to law enforcement officers and citizens alike: An officer who violates a criminal statute or police regulation violates the law regardless of whether he is aware of the law's existence.

The probable cause and reasonable suspicion standards are fully compatible with that maxim. These constitutional standards are objective. They permit officers to start the judicial process in cases where the law or facts are objectively uncertain and the officers' actions are objectively reasonable. See, *e.g.*, *Gates*, 462 U.S. at 231. Officers' subjective awareness of the law, however, has no relevance under these doctrines. In other words, ignorance remains no excuse.

2. Petitioner also argues (Br. 18-19) that his rule accords with the rule of lenity and the void for vagueness doctrine. Those rules ensure that the narrower reading of a criminal statute will prevail when, after a court employs the ordinary tools of statutory construction, an enactment remains so grievously ambiguous "that the Court must simply guess as to what Congress intended," *United States* v. *Castleman*, 134

S. Ct. 1405, 1416 (2014) (citation omitted), or so vague that citizens would lack notice of what the law proscribed, see *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). These rules do affect when officers may make an arrest to the extent that, if it is plain that an enactment is void or subject to the rule of lenity, it would be unreasonable for an officer to move forward with a stop or arrest. See *DeFillippo*, 443 U.S. at 38.

Petitioner's constitutional rule, however, would preclude stops and arrests in a far broader swath of cases than those actually covered by lenity or vagueness principles.[2] Petitioner would deter officers from making seizures that start the judicial process not only when courts would in fact determine that these principles controlled the analysis, but in every case in which there was uncertainty about whether courts would find these (or other) statutory construction principles favored the defendant. Accurate application of the principles of statutory construction that petitioner cites is best achieved by the traditional rules of probable cause and reasonable suspicion, which permit officers to bring cases of uncertainty before judges for decision.

E. This Court's Good-Faith Decisions Do Not, And Should Not, Alter The Fourth Amendment's Contours

1. Petitioner also argues (Br. 24) that the Court abrogated the traditional approach toward reasonable

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[2] Only some jurisdictions include the rule of lenity among their canons of construction, see 1 Wayne LaFave, *Substantive Criminal Law* § 2.2, at 119 (2d ed. 2003), making it a particularly questionable tool for establishing a nationwide constitutional rule for officers' conduct.

mistakes of law under the Fourth Amendment when it adopted a good-faith exception to the exclusionary rule. Petitioner misreads these cases. As petitioner acknowledges (Br. 23), the Court since the mid-1970s has treated the questions of Fourth Amendment rights and remedies as separate. See, *e.g.*, *Evans*, 514 U.S. at 10-12. In cases setting out the good-faith exception to the exclusionary rule, the Court has held that exclusion of evidence is an appropriate remedy only when exclusion's substantial social costs are outweighed by its deterrent benefits. *Id.* at 10-11. In performing this weighing, the Court has considered whether—assuming that a Fourth Amendment violation occurred—the violation reflected the type of "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence" necessary to warrant the drastic exclusionary sanction. *Herring* v. *United States*, 555 U.S. 135, 144 (2009).

While this assessment has sometimes involved consideration of whether an officer acted reasonably, the Court's exclusionary rule decisions reaffirm—rather than repudiate—the longstanding principle that the probabilistic standards of probable cause and reasonable suspicion allow for reasonable mistakes. In each of its decisions applying good-faith analysis to seizures based on probable cause, this Court expressly noted that it was not deciding whether the Fourth Amendment was violated at all by the police conduct at issue, because that question was not presented. *Herring*, 555 U.S. at 138-139; *Evans*, 514 U.S. at 6 n.1; *Leon*, 468 U.S. at 904. The most recent of these decisions went further, expressly stating that the reasonable mistake at issue might not violate the Fourth

Amendment precisely because the probable cause standard allows for reasonable mistakes. *Herring*, 555 U.S. at 139. The Court explained that "[w]hen a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation" for "[t]he very phrase 'probable cause' confirms that the Fourth Amendment does not demand all possible precision."[3] *Ibid.*

2. Petitioner suggests (Br. 29-33) that treating reasonableness as relevant only to good faith would be preferable. If this Court were to conclude that reasonable mistakes about the substantive law invalidate reasonable suspicion or probable cause, the Court's precedents would provide strong support for application of the good-faith exception when the officers' actions were objectively reasonable.[4] But a Fourth

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[3] Some types of mistakes of law violate the Fourth Amendment even when they are reasonable—for example, reasonable errors about the requirements of the Fourth Amendment itself. See, *e.g.*, *Davis*, 131 S. Ct. at 2423-2424 (addressing reasonable reliance on Fourth Amendment precedent later abrogated by this Court). That is because an officer's mistake about the Fourth Amendment cannot render constitutional the officer's actions. Thus, as *DeFillippo* explained, when officers make reasonable legal errors unrelated to whether a crime has occurred—for example, by conducting searches pursuant to statutes or judicial precedent allowing unconstitutional searches—their mistakes do violate the Fourth Amendment. See 443 U.S. at 39. But this case involves a reasonable mistake about the substantive criminal law, and thus implicates the fundamental precept of probable cause: that probable cause depends on probabilities, not certainties, that a crime was committed. See pp. 10-12, *supra*.

[4] The exclusionary rule calculus turns on whether application of the rule achieves deterrent value sufficient to outweigh its social cost. See *Leon*, 468 U.S. at 906-907. When an officer reasonably

Amendment standard that "treat[s] all police mistakes the same," Pet. App. 18a, is the simplest one. Such an approach is consistent with *Whren*, because whether an interpretation of law is objectively reasonable turns solely on analysis of the materials that courts would use in discerning the meaning of a statute. Petitioner's approach would layer additional complexity onto this standard, because rather than simply requiring courts to assess whether a mistake was reasonable, petitioner would first require courts to classify mistakes as those of fact (relevant to rights) and those of law (relevant to remedy). That line can be difficult to draw, and similar mistakes will fall on each side of the line. See *ibid.* (noting difficulty in applying test); Resp. Br. 20-22 (cataloging examples); see also, *e.g.*, I.H.E. Patient, *Mistake of Law—A Mistake?*, 51 J. Crim. L. 326, 331 (1987) (noting widespread criticism of the "supposed distinction between 'law' and 'fact'" and describing problematic cases).

Petitioner's administrability critique (Br. 30-33) stems largely from the concern that the principle that "[a] doubt as to the true construction of the *law* is as reasonable a cause for seizure as a doubt respecting the fact," *Riddle*, 9 U.S. (5 Cranch) at 313, requires courts to decide what legal errors are reasonable and what materials should inform that analysis. But this Court has not shied away from Fourth Amendment standards that require consideration of reasonable-

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believes that he has witnessed a traffic violation and has no means to abate it or determine the validity of his judgment without making a stop and invoking the judicial process, no appreciable or desirable deterrent value would be achieved by suppression if the courts later disagreed with the officer's objectively reasonable misunderstanding of the law.

ness, because reasonableness is the "touchstone" of Fourth Amendment validity. See, *e.g.*, *Riley*, 134 S. Ct. at 2482; *King*, 133 S. Ct. at 1970. In any event, petitioner's approach would not eliminate the need for the reasonableness inquiries he describes; he would simply treat inquiry into the reasonableness of mistakes of law as part of the remedial analysis. See, *e.g.*, Pet. Br. 23. This is not an administrability benefit—let alone a benefit sufficient to justify abandoning a historically grounded standard that appropriately balances public and private interests.

F. The Stop of Petitioner's Car Was Supported By Reasonable Suspicion

Sergeant Darisse acted properly in stopping petitioner's car based on his conclusion that petitioner's broken brake light violated North Carolina law, because that conclusion was based on a reasonable view of an unsettled legal question. Every justice of the state supreme court agreed that Sergeant Darisse's construction of the previously unconstrued provision was a reasonable one, with even the dissenters finding "no doubt" on this point. Pet. App. 20a (Hudson, J., dissenting). While the reasonableness of an intrusion under the Fourth Amendment is a question of federal law, when the answer to that question depends on assessing the legitimacy of a construction of state law, it would be strange to disturb a state court's conclusion. See *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law [and] we are bound by their constructions except in extreme circumstances.") (citations omitted).

In any event, the conclusion of the state supreme court was plainly correct, as North Carolina law afforded substantial textual support for the view that

Sergeant Darisse took. At the time of the stop, North Carolina's traffic code permitted brake lighting systems to be "incorporated into a unit with one or more *other* rear lamps," N.C. Gen. Stat. § 20-129(g) (2009) (emphasis added), suggesting that brake lamps on the rear of a car qualify as rear lamps. The traffic code further mandated that each "motor vehicle * * * have *all* originally equipped rear lamps or the equivalent in good working order." *Id.* § 20-129(d) (emphasis added). These provisions together provide strong affirmative support for the position that brake lamps on the rear of the vehicle are "originally equipped rear lamps" that must be "in good working order." *Ibid.* This reading finds additional support in other portions of state law prescribing the color of lenses on "[b]rake *lights*." *Id.* § 20-129.1(9) (emphasis added).

The reasonableness of Sergeant Darisse's view is confirmed by its prevalence. Cases involving similar stops had been adjudicated with no suggestion that a broken light was lawful. See *State* v. *Battle*, 525 S.E.2d 850, 852-853 (N.C. Ct. App. 2000). Indeed, the trial court in this case concluded that petitioner's broken brake light violated North Carolina law. J.A. 8-9. Finally, as the state supreme court noted, Sergeant Darisse's understanding of the law was "particularly reasonable" because it harmonized state requirements with federal ones, which require that passenger vehicles maintain two rear brake-lights. See Pet. App. 19a (citing 49 C.F.R. 571.108, at S.7.3.1 & tbl. I (2011)). In sum, because Sergeant Darisse's view of the law was far from unreasonable, when he witnessed what he reasonably believed to be a dangerous and illegal condition, the Constitution permitted him to make a vehicle stop.

CONCLUSION

The judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted.

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JULY 2014

AMICUS CURIAE BRIEF

No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF PROSECUTING ATTORNEYS, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE ROCKLAND COUNTY DISTRICT ATTORNEY'S OFFICE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a police officer's objectively reasonable mistake of law can provide reasonable suspicion sufficient to justify a traffic stop under the Fourth Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

The Association of Prosecuting Attorneys (APA) was founded as a national "think tank" to represent all prosecutors and provide resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make our communities safer. The APA is the only national organization to represent and support all prosecutors, both appointed and elected, as well as their deputies and assistants, whether they work as city attorneys, tribal prosecutors, district attorneys, state attorneys, attorneys general, or U.S. attorneys.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." The NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The Rockland County District Attorney's Office has the responsibility and authority to both investigate and prosecute crimes and offenses in Rockland County and undertake all efforts necessary to proactively prevent the commission of crimes. Rockland County is a suburb located about 25 miles from New York City. Rockland's law-enforcement community is typical of smaller jurisdictions that lack the manpower and fiscal resources that many larger jurisdictions possess. Thus, rules that further local law enforcement's ability to quickly gather information as incidents occur are paramount to both protecting local residents and prosecuting offenders. Limitations of the kind contemplated in this case often have an outsized effect on smaller jurisdictions.

SUMMARY OF THE ARGUMENT

Petitioner Heien asks this Court for a blanket rule that a police officer's mistake of law can never be objectively reasonable or serve as the basis for reasonable suspicion of wrongdoing. The Court should reject that request as incongruent with the Fourth Amendment's singular attainable standard of "reasonableness."

This Court has already held that the Fourth Amendment does not require the factual grounds for a stop be correct, only that they be reasonable. Nothing in the Fourth Amendment's text suggests that a higher standard applies to law enforcement's legal grounds. Reasonable minds can disagree about a matter of law just as easily as a matter of fact. And the Fourth Amendment goal of protecting the public from harassment and abuse can just as easily accommodate a reasonable mistake of law as it can a reasonable mistake of fact.

This case presents the perfect example. Only after a long statutory analysis involving a number of archaic traffic-code sections did the North Carolina Court of Appeals conclude as a matter of first impression that North Carolina law requires only one working brake light. The officer who conducted the stop here had no reason to know that the Court of Appeals would reach that result; even the trial court agreed with the officer's legal view that two lights were required. Declaring the stop invalid based on a contrary yet unforeseeable, post-hoc judicial ruling does nothing to guide law-enforcement decisions or discourage abuse; it only creates a technicality for evading criminal prosecution. The North Carolina Supreme Court appropriately rejected such analysis, and this Court should affirm.

STATEMENT

Sergeant Matt Darisse was observing traffic when he saw a Ford Escort with a broken, right rear brake light. Pet. App. 2a. Sergeant Darisse stopped the car, told the driver, Maynor Javier Vasquez, that he had a nonfunctioning brake light, and issued a warning ticket. Pet. App. 2a.

During the stop, Sergeant Darisse became suspicious that the car might contain contraband. His suspicion was heightened when Vasquez and Petitioner Heien, a passenger, gave conflicting information. Both Vasquez and Heien consented to the search. Pet. App. 2a–3a. That search revealed cocaine in the car, resulting in charges and Heien's guilty plea to two counts of attempted cocaine trafficking. Pet. App. 3a–5a. Heien preserved his right to appeal the trial court's denial of his motion to suppress.

The North Carolina Court of Appeals reversed, holding that archaic North Carolina traffic laws required only one functioning brake light, and that Sergeant Darisse's stop was therefore objectively unreasonable. *State* v. *Heien*, 714 S.E.2d 827, 831 (N.C. Ct. App. 2011). The North Carolina Supreme Court reversed. While declining to decide whether the Court of Appeals correctly analyzed North Carolina law regarding brake lights, the North Carolina Supreme Court held that a reasonable mistake of law does not make a stop objectively unreasonable. *State* v. *Heien*, 737 S.E.2d 351, 359 (N.C. 2012).

ARGUMENT

I. The Fourth Amendment imposes one simple standard for conducting a traffic stop: that it be "reasonable."

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Amendment's essential purpose is to impose a standard of reasonableness on government officials to limit their discretion. *Delaware* v. *Prouse*, 440 U.S. 648, 653–54 (1979). Thus, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley* v. *California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006)).

Because a traffic stop is a form of temporary seizure, it must be reasonable under the circumstances. *Whren* v. *United States*, 517 U.S. 806, 809–10 (1996). While many seizures require probable cause to believe a crime has been or is being committed, this Court has observed that most traffic stops resemble the kind of brief detention authorized by a mere reasonable suspicion of wrongdoing under *Terry* v. *Ohio*, 392 U.S. 1 (1968). *Arizona* v. *Johnson*, 555 U.S. 323, 330 (2009).

"Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible." *Ornelas* v. *United States*, 517 U.S. 690, 695 (1996). "They are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Id.* (quoting *Illinois* v. *Gates*, 462 U.S. 213, 231 (1983)).

Accordingly, this Court has "deliberately avoided reducing [reasonable suspicion] to 'a neat set of legal rules.'" *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002) (quoting *Ornelas*, 517 U.S. at 695–96). And it has rejected legal analyses that have unnecessarily complicated the "relatively simple" standard of "reasonableness." *Id.* The Court has instead directed courts to consider the "'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* at 273.

An officer's basis for suspecting legal wrongdoing can be said to involve three components: a factual determination, a legal determination, and an application of the law to the facts. See *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (error may be based on mistake of law, mistake of fact, or mistake in applying facts to law); see also *Ornelas*, 517 U.S. at 696–97. If reasonableness is the only standard that should be applied to determine whether the stop is valid—and it is—then each distinct basis for an officer's decision should be judged solely by that standard.

A. Like a mistake of fact, a mistake of law can be "objectively reasonable."

This Court has applied the reasonableness standard to the factual component by directing courts to view the historical facts "from the standpoint of an objectively reasonable police officer." *Id.* at 696. As this Court stated in *Terry* v. *Ohio*, the question then is "would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" 392 U.S. at 21–22 (internal quotations omitted).

Accordingly, even a mistake of fact does not invalidate a justified search or seizure under the Fourth Amendment, as long as it is reasonable. *Illinois* v. *Rodriguez*, 497 U.S. 177, 184–86 (1990) (upholding warrantless consent search where officers reasonably, but erroneously, believed the person who consented was a resident of the premises); *Hill* v. *California*, 401 U.S. 797, 802–05 (1971) (upholding warrantless arrest and search incident thereto of a person reasonably, but erroneously, believed to be the suspect for whom officers had probable cause to justify the arrest). "Because many [factual] situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). "[T]o satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable." *Rodriguez*, 497 U.S. at 185.

The logic behind tolerating reasonable mistakes of fact applies with equal force to reasonable mistakes of law. When an officer conducts a stop, he does so on the basis of legal as well as factual information available to him at the time. If the legal landscape is more or less ambiguous, that is simply part of the "totality of the circumstances" that a court should consider in deciding whether reasonable suspicion exists. The reasonableness of the suspicion of legal wrongdoing should not be judged on subsequent court decisions that clarify or establish the law, as was the case with the North Carolina Court of Appeals' decision here.

Instead, the reasonableness of the suspicion of legal wrongdoing should be judged—as with factual determinations—from the viewpoint of an "objectively reasonable police officer," cf. *Ornelas*, 517 U.S. at 696, based on the legal authority available at the time, cf. *Terry*, 392 U.S. at 21–22 (directing court to look at the factual information available at the time).

When, as in this case, a statute lends itself to more than one interpretation from the viewpoint of an objectively reasonable officer, then the question should be whether the suspicion of wrongdoing is supported by one of those reasonable interpretations. If so, then the stop should be constitutionally valid, even if a court later interprets the law differently. To require more would be to impose not a standard of reasonableness but of legal correctness. The text of the Fourth Amendment certainly does not impose such a standard. And no previous decision of this Court has extended the Fourth Amendment to do so. The Court should decline Petitioner's request to create a heightened standard for mistakes of law.

B. Accepting reasonable mistakes of law avoids inappropriate inquiries into an officer's subjective intentions.

If the Fourth Amendment treats reasonable mistakes of fact and law differently, courts will have to identify the officer's exact motivation for conducting a traffic stop. That would run directly contrary to the principle that "[s]ubjective intentions play no role in . Fourth Amendment analysis." *Whren*, 517 U.S. at 813.

To illustrate, consider the following scenario, loosely based on *United States* v. *Cashman*, 216 F.3d

582 (7th Cir. 2000). An officer conducts a traffic stop after observing the suspect's cracked windshield, which he reasonably believes violates the state law prohibiting excessively cracked windshields. Subsequently, a court interprets excessive cracking to mean a crack extending at least ten inches, and the crack that motivated the stop measures at only nine inches. To determine whether the officer's mistake was one of fact or law, the court would need to determine whether, at the time of the stop, the officer had (a) accurately interpreted the law, but erroneously believed the crack to be at least ten inches long, or (b) accurately perceived the crack to be nine inches long, but erroneously believed that a nine-inch crack would violate the law against excessive cracking.

This type of subjective inquiry is at odds with the reality that Fourth Amendment jurisprudence has already "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 813. Instead courts should simply ask whether the traffic stop was objectively reasonable under the totality of the factual and legal circumstances. Doing so allows courts to consistently apply the totality-of-the-circumstances analysis without delving into the subjective motivations of law enforcement. It also simplifies the analysis by avoiding judicial inquiries into officer mistakes of fact and mistakes of law and focusing courts on reasonableness.

Because the distinction between mistakes of law and fact is often difficult to discern, applying the same analysis to both types of mistakes avoids the pitfalls associated with making this distinction

during prosecution. Daniel N. Haas, Comment, *Must Officers Be Perfect?: Mistakes of Law and Mistakes of Fact During Traffic Stops*, 62 DePaul L. Rev. 1035, 1057 (2013). Both the Eighth Circuit and the North Carolina Supreme Court have demonstrated that the "totality of the circumstances" test comfortably encompasses mistakes of law as well as mistakes of fact. See *United States* v. *Martin*, 411 F.3d 998, 1001 (8th Cir. 2005); *Heien*, 737 S.E.2d at 357. This Court's adoption of the same approach will enhance the consistency of judicial determinations regarding the reasonableness of a traffic stop under the Fourth Amendment, which in turn provides clearer guidance for law enforcement officers who must determine whether to make such stops.

C. This Court has repeatedly rejected the notion that the Fourth Amendment demands legal precision.

Determining whether a search or seizure was reasonable under the Fourth Amendment should not entail significant or technical legal analysis. Determinations of probable cause, for instance, are ultimately an assessment of probabilities, which are "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar*, 338 U.S. at 175. Likewise, determinations of reasonable suspicion "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States* v. *Cortez*, 449 U.S. 411, 418 (1981).

After all, "affidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation," and "warrants long have been issued by persons who are neither lawyers nor judges on

the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings." *Illinois* v. *Gates*, 462 U.S. 213, 235–36 (1983) (internal quotations and citations omitted).

Moreover, "[t]he management of a police encounter in the field does not occur with the same stable pattern or predictability and controlled rate of tempo found in the classroom." Lawrence N. Blum, *Why Things Go Wrong in Police Work*, The Police Chief, vol. 71, no. 7, July 2004, http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=336&issue_id=72004. "The Fourth Amendment has to be applied [by officers] on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001).

Consequently, the Fourth Amendment cannot demand that officers perfectly comprehend and adhere to every aspect of the law. This Court has recognized that in numerous instances. In *Atwater*, this Court upheld as constitutional an arrest for a fine-only minor offense, noting that "we cannot expect every police officer to know the details of frequently complex penalty schemes." *Id.* at 323, 348.

In *Virginia* v. *Moore*, this Court upheld an arrest based on probable cause even though the arrest was prohibited by state law. 553 U.S. 164, 166, 176 (2008). Acknowledging that state laws limiting police arrest authority "can be complicated," the Court declined to make such compliance a condition to

satisfying the Fourth Amendment because doing so would unduly complicate what is supposed to be a simple standard. *Id.* at 175.

Most significantly, in *Michigan* v. *DeFillippo*, this Court held that "[a] prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the [violated] ordinance unconstitutional." 443 U.S. 31, 37–38 (1979). The Court did not expect officers to accurately resolve the constitutionality of legislation, "with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."[2] *Id.* at 38. Likewise, the Court should not expect officers to accurately predict the correct statutory construction among several reasonable possibilities, particularly when even fair-minded jurists could disagree, as they did here.

Notably, the above decisions upheld far more intrusive seizures than the one at issue in this case. Where only "reasonable suspicion" is required, an officer need not even have a specific criminal law in mind when making a stop to conduct further investigation. The stop can be based simply on an officer's observation of "a series of acts, each of them perhaps

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[2] The Eighth Circuit has similarly said that courts "'should not expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney' [or] a federal judge." *United States* v. *Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) (quoting *United States* v. *Sanders*, 196 F.3d 910, 913 (8th Cir. 1999)).

innocent in itself, but which taken together warrant[] further investigation." *Terry*, 392 U.S. at 22. "[C]oncerns about the rules of construction regarding the substantive statutes at issue seem more applicable to the subsequent judicial interpretation of a statute and not to a routine traffic stop that needs to be based only on reasonable suspicion." *Heien*, 737 S.E.2d at 357.

Officers are trained to investigate conduct that is potentially criminal and protect the community; courts are trained in the canons of statutory construction. Though law enforcement officers are specially trained to make factual determinations, see *Arvizu*, 534 U.S. at 273, mistakes of fact are still tolerated.

Accordingly, the Fourth Amendment should at least equally tolerate mistakes of law, given that legal determinations are more the specialty of courts than agents in the field. A traffic stop based on a reasonable mistake of law is no greater an affront to the Fourth Amendment—if anything it is even more constitutionally tolerable than a reasonable mistake of fact.

II. Allowing reasonable mistakes of law draws the proper balance between privacy and law-enforcement interests.

The reasonableness standard seeks to balance citizens' privacy interests against providing law enforcement with enough leeway to effectively protect the community it serves. *Brinegar*, 338 U.S. at 175–76. Nothing suggests that allowing mistakes of law (as long as they are objectively reasonable) would upset this balance by encouraging excessive searches or seizures. On the other hand, imposing a standard of legal perfection would unduly complicate officers' application of the Fourth Amendment in the field, lead to potentially harmful delay in their response to dangerous or criminal behavior, and meaninglessly thwart prosecution of crimes discovered during the stop.

A. The public's privacy is still adequately protected if reasonable mistakes of law are tolerated.

Petitioners have offered no evidence that allowing reasonable mistakes of law would be difficult to apply or lead to abuse; the evidence is to the contrary. Having concluded that a reasonable mistake of law can provide the reasonable suspicion the Fourth Amendment requires for a traffic stop, the Eighth Circuit still ruled that the stop was unconstitutional, as there were no confusing statutes, case law, or other state customs or practices that might support the reasonableness of the officer's belief that a law had been broken. *United States* v. *Washington*, 455 F.3d 824, 827–28 (8th Cir. 2006). As the Court observed, "[t]he concept of an objectively reasonable mistake of law [need not be] unmoored from actual legal authority." *Id.* at 828.

In no way would a rule permitting reasonable mistakes of law give officers the opportunity to make stops on an unreasonable whim. Ultimately, an officer who makes a mistake of law when conducting a stop bears the burden of proving to the reviewing court that his mistake was reasonable. Haas, *supra*, at 1051.

Further, there is no risk that law enforcement could repeatedly exploit the same legal ambiguities or vagueness. Once the judiciary has highlighted a mistake—as the North Carolina Court of Appeals did here with respect to a vehicle's broken brake light—it becomes immediately less reasonable for that officer or any other to make the same mistake of law again. In that sense, the rule would be permanently self-correcting. Once the judiciary has pronounced the correct interpretation, it will be exceedingly difficult for other officers to make the same mistake of law and show that it was reasonable.

B. Disallowing reasonable mistakes of law serves no purpose other than to hamper law enforcement.

In *Brinegar* v. *United States*, this Court observed that requiring more than reasonableness on the part of law enforcement officers in their factual perceptions "would unduly hamper law enforcement." 338 U.S. at 176. The same is true if the Court requires more than reasonableness in their legal perceptions.

While officers can be expected, in the spur of the moment, to ask themselves whether their assessment of the situation at hand is reasonable, they are not equipped to instantaneously perform the statutory construction necessary to ensure that the new situation they have encountered falls within the parameters of existing law, much less omnisciently predict which legal interpretation the courts might settle on after the fact. Officers have no choice but to enforce the law as they reasonably understand it. Thus, a policy of perfection in legal assessments does not incentivize perfection, as that is not achievable.

At worst, applying a higher standard to legal mistakes puts officers in the position of trying to determine whether any doubts arise from an uncertainty in their perception of the law and may cause them to second-guess their legal understanding when they encounter new situations. This second-guessing causes delay, which could impair law enforcement and community protection.

Setting a higher standard also sends a message to law enforcement that officers should err on the side of interpreting the law narrowly, at the risk of letting criminal behavior go unchecked when it is on the edge of the law. The North Carolina Supreme Court prudently endorsed officers' reasonable interpretation of traffic safety laws, since it would "at a minimum, work at cross-purposes if we were to require our law enforcement officers to narrowly interpret our traffic safety statutes when deciding whether to conduct a stop for fear that a possible subsequent prosecution for the violation could be imperiled." *Heien*, 737 S.E.2d at 357. This "would undermine officers' important efforts in keeping . roads safe." *Id.*

Beyond creating a helpless and ineffective situation for law enforcement, Petitioner's proposed rule would needlessly frustrate the administration of justice. A Fourth Amendment violation frequently results in the exclusion of evidence of other crimes discovered during a subsequent, otherwise justified search. Pet. 13. Petitioner has pointed to as many as 16 states where the fruit of an unlawful stop is excluded, regardless of the officer's good faith. *Id.* Petitioner's unattainable standard serves little purpose other than to set guilty criminals free.

* * *

To hold a mistake of law per se unreasonable creates a bright-line rule that is at odds with this Court's Fourth Amendment jurisprudence. Haas, *supra*, at 1053. "Such a rule would [inappropriately] insert rigidity into a fluid concept." *Heien*, 737 S.E.2d at 358. Applying a standard to mistakes of law that is different from that applied to mistakes of fact and unmoored from the standard of reasonableness would unduly complicate what is supposed to be a simple and easily applied standard. It also would overly constrain law enforcement, upsetting the balance between public safety and individual privacy that the reasonableness standard cultivates.

Officers charged with enforcing laws should not have to labor under an unattainable goal of perfect legal understanding or second-guess their reasonable view of the law any more than they should have to perfectly perceive the facts or second-guess their reasonable perceptions. Haas, *supra*, at 1058–59. They should instead be allowed to rely on a plain and simple suspicion of legal wrongdoing, as long as any potential mistakes are "those of reasonable men." *Brinegar*, 338 U.S. at 176.

CONCLUSION

The judgment of the North Carolina Supreme Court should be affirmed.

Respectfully submitted,

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JULY 2014

AMICUS CURIAE BRIEF

No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN, *Petitioner*,

v.

NORTH CAROLINA, *Respondent*.

On Writ of Certiorari to the
Supreme Court of North Carolina

Brief *Amicus Curiae* of Gun Owners Foundation, Gun Owners of America, Inc., U.S. Justice Foundation, The Lincoln Institute for Research and Education, Free Speech Coalition, Free Speech Defense and Education Fund, Western Journalism Center, The Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, Policy Analysis Center, Downsize DC Foundation, and DownsizeDC.org in Support of Petitioner

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June 16, 2014

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Free Speech Defense and Education Fund, Western Journalism Center, Conservative Legal Defense and Education Fund, Policy Analysis Center, and Downsize DC Foundation are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc., Free Speech Coalition, The Abraham Lincoln Foundation for Public Policy Research, Inc., and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, including programs to conduct research and to inform and educate the public on important issues of national concern, the proper construction of state and federal constitutions and statutes, questions related to human and civil rights secured by law, and related issues. Each organization has filed a number of *amicus curiae* briefs in this Court and other federal courts. With respect to the Fourth Amendment, many of these *amici* filed an *amicus curiae* brief in this Court at the petition stage as well as an *amicus curiae* brief on the merits in

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012), and an amicus curiae brief in United States v. Wurie, U.S. Supreme Court Docket No. 13-212.

SUMMARY OF ARGUMENT

The Supreme Court of North Carolina ruled that a traffic stop predicated on violation of traffic laws did not violate the Fourth Amendment, even though there was no actual violation of traffic laws, because the judges believed the traffic stop was "reasonable" based on the "totality of the circumstances." The Fourth Amendment allows for no such stops. Indeed, the rationale adopted by the court in crafting its own definition for the one word "unreasonable" in the Fourth Amendment demonstrates how a court decision can be superficially grounded in the "words" of a constitutional provision while at the same time being completely unfaithful to the context and Founders' meaning of the text. This decision is an outlier when compared to the decisions of several courts of appeals and the highest courts of other states, and cannot be allowed to stand.

This case also provides this Court an opportunity to revisit its Fourth Amendment jurisprudence, and establish clear guidance for lower courts as to its scope. Specifically, it invites this Court to apply the private property principles expressed in the Fourth Amendment to a traffic stop case, rather than to decide this case based on an atextual reasonable expectation of privacy test. This case also allows this Court to build on its recent cases which reaffirm the property basis of the Fourth Amendment, as done recently in

United States v. Jones, 565 U.S. __, 132 S.Ct. 945 (2012) and Florida v. Jardines, 569 U.S. __, 133 S.Ct. 1409 (2013).

A proper analysis of the traffic stop below based on the property principles of the Fourth Amendment exposes the absurdity of sanctioning an illegal stop even if the judges believe the police officer acted reasonably. The scope of the Fourth Amendment was established by the Founders, and cannot be diminished by modern judges who view traffic safety more important than property rights. The good faith or subjective impression of the officer, however "reasonable," is irrelevant to proper constitutional analysis.

ARGUMENT

On the morning of April 29, 2009, a deputy sheriff in Surry County, North Carolina made a traffic stop of a Ford Escort solely because one of its brake lights failed to illuminate. State v. Heien, 366 N.C. 271, 272 (N.C. 2012). North Carolina's decades-old statutes require only one such brake light, termed a "stop lamp," to be functional (State v. Heien, 214 N.C. App. 515, 518 (N.C. 2011)), and "[n]o North Carolina appellate court" has ever reached any other conclusion. Pet. Br. at 2-3. Although the record is unclear as to what the deputy sheriff actually knew, the Supreme Court of North Carolina assumed that he was unaware of this law, and viewed his ignorance of the traffic laws, which he was tasked to enforce, as a "mistake of law." 366 N.C. at 275. The officer's actions, through a series of events, led to a 40-minute search of the car

and charges being brought against the driver and passenger for drug possession. 366 N.C. at 279; Pet. Br. at 3-4. The passenger in the car, Heien, challenged the legality of the traffic stop.

It is well established that a police traffic stop of an automobile constitutes a Fourth Amendment seizure of the automobile and its occupants. *See* Whren v. United States, 517 U.S. 806, 809-10 (1996). A "bare majority of the North Carolina Supreme Court" believed the stop in this case to be based on a reasonable mistake of law by the police officer, and therefore valid. Pet. Br. at 2. The only question presented to this Court, then, is whether a police officer may engage in a Fourth Amendment seizure based on his mistaken belief that perfectly legal behavior is illegal, so long as courts later deem his mistake to have been "reasonable."

The state supreme court decision below is clearly an outlier[2] under the decisions of other federal and state

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[2] The case below is an outlier even within North Carolina. Erroneously characterizing the issue as one of "first impression for this Court," the state supreme court established what the dissent termed a sort of "'good faith exception' for stops conducted in contravention of the law...." 366 N.C. at 286. In a similar case, State v. Ivey, 360 N.C. 562 (N.C. 2006) (overruled on other grounds), an officer stopped a vehicle for failure to signal before making a turn, and a resulting search of the vehicle led to the discovery of an illegal firearm. *Id.* at 563. The Supreme Court of North Carolina held that "[i]n examining the legality of a traffic stop, the proper inquiry is not the subjective reasoning of the officer, but whether the objective facts support a finding that probable cause existed to stop the defendant." *Id.* at 564. The stop in Ivey violated the Fourth Amendment "[b]ecause failure to

courts, as demonstrated by Petitioner. *See* Pet. at 11-12. However, these *amici* focus on three related Fourth Amendment issues not addressed by Petitioner. As discussed in section I, *infra*, the rationale adopted by the Supreme Court of North Carolina demonstrates how a court decision can be superficially grounded in the "words" of a constitutional provision, while at the same time being completely unfaithful to the context and Founders' meaning of the "text." Section II addresses the odyssey this Court has followed in its Fourth Amendment jurisprudence, first embracing its atextual privacy tests, but recently returning to the Fourth Amendment's more robust property principles, as reaffirmed in United States v. Jones, 565 U.S. __, 132 S.Ct. 945 (2012) and Florida v. Jardines, 569 U.S. ___, 133 S.Ct. 1409 (2013). Lastly, section III argues that stopping an automobile on "reasonable suspicion" of activity that violates no law is *per se* unreasonable, in violation of the Fourth Amendment.

I. THE DECISION BELOW WAS BASED ON NO FIXED PRINCIPLE OF LAW, BUT RATHER ON THE SUBJECTIVE OPINION OF FOUR JUDGES AS TO WHAT THEY FELT "REASONABLE" UNDER THE "TOTALITY OF THE CIRCUMSTANCES."

The Supreme Court of North Carolina framed the Fourth Amendment issue presented as follows: "whether there was **reasonable suspicion** for the

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give a signal, in and of itself, does not constitute a violation [and] nothing in the record suggests Officer Rush had probable cause to believe any traffic violation occurred." *Id.* at 566.

stop that led to defendant's convictions...." 366 N.C. at 271 (emphasis added). The court explained that its determination as to the "reasonableness" of the officer's suspicion follows the court's review of the facts in the record, considering "the **totality of the circumstances**...." 366 N.C. at 276 (emphasis added). Indeed, the court stated its understanding that under the Fourth Amendment:

> [t]he question of whether **reasonable suspicion** exists has historically been answered by considering the **totality of the circumstances** present in each individual case rather than on the basis of **bright-line rules**. [*Id.* at 281 (emphasis added).]

"After reviewing the **totality of the circumstances**," the court "conclud[ed] that there was an objectively **reasonable basis to suspect** that illegal activity was taking place." *Id.* at 271-72. Indeed, the court found "the **primary command** of the Fourth Amendment [to be] that law enforcement agents act **reasonably**." *Id.* at 278 (emphasis added). True to this understanding, some variant of the word "reasonable" appears no fewer than 74 times in the court's opinion, followed by another 21 uses in the dissenting opinion.[3]

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[3] The analysis of the Fourth Amendment conducted by the three dissenting judges was only slightly better than that of the majority, as it also focused on the "reasonableness" of the stop, criticizing the majority only for "eviscerating the 'objectively reasonable' standard of the Fourth Amendment." *Id.* at 288.

In focusing on the reasonableness of the search, the court below created the impression that it was attempting to apply faithfully the text of the Fourth Amendment, which ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated...." (Emphasis added.) However, the court made no effort to identify what the Founders meant by that language, and what types of "searches and seizures" the Founders considered to be "unreasonable." By singling out one word, "unreasonable," without addressing any of the other words in the amendment, the justices erroneously assumed that the language as a whole invites them to determine which searches and seizures they believe to be reasonable, in much the same way as a common law jury might decide an automobile accident case. Based on that understanding, the Supreme Court of North Carolina felt justified in eschewing any principled basis for (or "bright-line rule" governing) its decision, giving force instead to what the judges felt was reasonable for the officer to have done in the situation.

Freed from any contextual constraint, the lower court concluded that, even though the stop was **illegal**, the stop was **constitutional**, because "there was an objectively **reasonable** basis **to suspect** that illegal activity was taking place." 366 N.C. 271-72 (emphasis added).[4] This conclusion appears to be based on the

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[4] The Supreme Court of North Carolina cited Terry v. Ohio, 392 U.S. 1 (1968), for the proposition that "the reasonable suspicion standard does not require an officer actually to witness a violation of the law before making a stop." 366 N.C. at 279. Of course, one

misconception that the Fourth Amendment is only concerned that police act reasonably (*id.* at 279) and, if they do, it does not matter that their actions were illegal. The court held that in this case, although the officer was mistaken about the law, his mistake was reasonable, and that it was reasonable to be mistaken about the law.[5] In other words, according to the decision below, it can be reasonable for Fourth Amendment purposes for the police to act illegally.

The Supreme Court of North Carolina's opinion justified the traffic stop because the court was "particularly concerned for maintaining safe roadways."[6] 366 N.C. at 279. It explained that

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important fact the lower court omits is that Terry dealt with an officer who had reasonable suspicion of actual illegal activity, not activity erroneously assumed to be illegal.

[5] The dissent notes that this holding "endorse[s] 'the fundamental unfairness of holding citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it.'" *Id.* at 288. Indeed, in a criminal case, a mistake of fact is sometimes a defense, while a mistake of law is not. North Carolina, by imputing knowledge of the law to criminal defendants, would require laymen to be masters of the universe of state laws and regulations, but at the same time would lift that same responsibility from the police, even though officers receive substantial training as to what the laws are, and are paid to know that subject well.

[6] The Supreme Court of North Carolina went so far as to make the curious claim that "it seems to us that most motorists would actually prefer to learn that a safety device on their vehicle is not functioning properly." 366 N.C. at 279. These observations about traffic stops reveal that judges may not be in the best position to explain how they are viewed by ordinary Americans. Certainly,

"narrowly interpret[ing] our traffic safety statutes ... would undermine our officers' important efforts in keeping our roads safe." 366 N.C. at 279-80. Thus, it described the circumstances of the stop as "a routine traffic stop" when the officer "was observing traffic" when he noticed the brake light in the car in which Heien was riding "failed to illuminate." 366 N.C. at 272. Actually, this description of the circumstances of the stop is at significant variance with the opinion of the North Carolina Court of Appeals (214 N.C. App. at 515) and the record which reveals that the traffic stop of Heien had almost no relation to establishing "safe roadways."[7]

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it would be unrealistic to assume that police treat judges during traffic stops the same way they treat ordinary citizens. *See, e.g.*, "Stephens County judge pulled over for speeding," KSWO News (Dec. 5, 2008). http://www.kswo.com/story/9467402/stephens-county-judge-pulled-over-for-speeding; "T. Haeck, "Snohomish County judge avoids DUI charge," MyNorthwest.com (Oct. 30, 2012). http://mynorthwest.com/11/2016981/VIDEO-Snohomish-County-judge-avoids-DUI-charge.

[7] The state supreme court erroneously described the stop as "a routine traffic stop" where the officer "was observing traffic ... when he noticed" that the brake light in the car in which Heien was riding "failed to illuminate," at which point he "decided to stop" the car. 366 N.C. at 272. In fact, the record reveals that on the day in question the officer was not focused on highway safety, but rather was engaged in "criminal interdiction" "looking for criminal indicators of drivers, of passengers also." J.A. 13-14, 26. *See* Pet. Br., p. 43.

The supposed "criminal indicators" (*i.e.*, suspicious behavior) identified by the officer during trial were that the driver "appeared very stiff and nervous as he drove by me. So I pulled out." J.A. 15. The officer explained that the reason for this conclusion about the driver was that he "was gripping the steering

In truth, the Supreme Court of North Carolina engaged in what could best be described as interest balancing — pitting the Fourth Amendment rights of the individual against the benefit of allowing the government to violate them. The court asserted that a traffic stop pursuant to baseless suspicion of wrongdoing is "not a substantial interference with the detained individual and is a minimal invasion of privacy." 366 N.C. 271 at 279. Balanced against "society's countervailing interest in keeping its roads safe" (*id.*), it is no wonder that the interests of the individual would be required to bend. Justice Scalia

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wheel at a 10 and 2 position, looking straight ahead." J.A. 15. Neither the Supreme Court of North Carolina nor the North Carolina Court of Appeals addressed the absurdity of finding such behavior suspicious. For many years, driver's education courses have taught the "10 and 2" hand positioning for driving, and teach drivers to keep their eyes on the road. In essence, the officer testified under oath that in his professional judgment it is suspicious for drivers to drive too well. **Only after the officer found the driver suspicious and decided to follow, did the officer notice an issue with the brake light**. *Id.*

Based on the officer's admission that his assignment that day was "criminal interdiction," not traffic safety, combined with his admission that he began following the car because the driver exhibited "criminal indicators," one could reasonably conclude that the real reason for this stop was not the car's stop light, but rather was pretextual. Of course, this Court has approved pretextual traffic stops for an observed traffic violation, even though the officer's real (subjective) reason for making the stop was wholly unrelated to safety. *See* Whren v. United States, 517 U.S. 806 (1996). Should this Court now agree with the Supreme Court of North Carolina and not even require law enforcement to have a pretext for a traffic stop, it would be difficult to conceive of a traffic stop which would be barred by the Fourth Amendment. Indeed, it would be tantamount to a declaration by this Court that the Fourth Amendment does not apply to traffic stops.

has accurately described such tests as "judge-empowering."[8]

But the Fourth Amendment standard of reasonableness is not an amorphous standard in which judges may find infinite shades of gray. It does not prescribe a subjective inquiry into what a group of judges think seems reasonable to them. Rather, it calls for an objective inquiry into whether a certain action is or is not "reasonable" based on the specific rights embodied in the text and context of the Fourth Amendment.

II. THE FOURTH AMENDMENT QUESTION IN THIS CASE SHOULD BE ANALYZED AND RESOLVED ON THE BASIS OF OBJECTIVE PROPERTY RIGHTS, NOT SUBJECTIVE NOTIONS OF REASONABLENESS.

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." In its opinion below, the Supreme Court of North Carolina never analyzes the relevant text of that Amendment, preferring to speak in generalities such as "the primary command of the Fourth Amendment [is] that law enforcement agents act reasonably." 366 N.C. at 278.

It is not surprising that the state supreme court's opinion had the central focus on "reasonableness" that it did. Indeed, much of that focus comes from this

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[8] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

Court's search and seizure cases which, for many years, strayed far from the constitutional text.

In 1996, Supreme Court Chief Justice Rehnquist penned the line that "the 'touchstone of the Fourth Amendment is reasonableness."[9] It is true that the word "unreasonable" does appear in the Fourth Amendment, but it appears in a specific context. In identifying the "touchstone" of "reasonableness," Chief Justice Rehnquist treated "unreasonable" as the only word that really matters, rendering the rest of the Amendment superfluous, as if the Fourth Amendment could simply have said "The police must act reasonably when conducting searches and seizures." This approach violates the canon of construction that "the text must be construed as a whole." *See* A. Scalia & B. Garner, Reading Law, Thompson/West (2012), p. 168. *See also* Holmes v. Jennison, 39 U.S. 540, 570-1 (1840) ("every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added").

As the Court began in the 1960's to read the word "reasonableness" in isolation, to mean whatever judges believed was reasonable under the circumstances, what was "reasonable" became linked to whether the court believed a person's "right to privacy" had been violated. Although the term "privacy" is not found anywhere in the Constitution, a privacy standard was embraced by the Court in the cases of Warden v.

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[9] Ohio v. Robinette, 519 U.S. 33, 39 (1996).

Hayden, 387 U.S. 294 (1967), and Katz v. United States, 389 U.S. 347 (1967).

Indeed, Warden v. Hayden explicitly stated that "[t]he premise that property interests control the right of the Government to search and seize has been discredited ... the principal object of the Fourth Amendment is the protection of privacy rather than property, and [we] have increasingly discarded fictional and procedural barriers rested on property concepts."[10] *Id.*, 387 U.S. at 304.

It may have been that a privacy standard originally was adopted in order to fill a gap created by this Court's earlier decision that individuals had no property interest in their electronic communications.[11] Over the years, however, this newly minted privacy concept failed to expand Fourth Amendment protection, but rather operated to reduce it.[12]

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[10] The prohibition against "unreasonable searches and seizures" was never intended to give judges completely unrestrained and open-ended power to ignore the Fourth Amendment if they (personally) believed government agents acted reasonably — by, for example, determining whether the police had violated any subjective "expectation of privacy" that "society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967).

[11] *See* Olmstead v. United States, 277 U.S. 438 (1928).

[12] *See* H. Titus & W. Olson, "U.S. v. Jones: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE SCHOOL OF LAW JOURNAL OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Jan. 2013), pp. 252-59, http://lawandfreedom.com/site/publications/Case%20Western%20Law%20Review.pdf

Gradually, evolving notions of what level of privacy was deemed "reasonable" had the effect of authorizing more and more intrusive government searches and seizures deemed "reasonable," even though they constituted clear violations of property rights.[13]

In Delaware v. Prouse, 440 U.S. 648 (1979), Justice White viewed the inquiry into the reasonableness of a traffic stop as revolving around "privacy," to be "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654. Although Prouse invalidated a suspicionless stop ostensibly to check a license and registration, it did so only based on the particular "totality of the circumstances," by balancing the intrusiveness of the stop against the governmental interests which the Court did not believe would be furthered by the

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[13] *See, e.g.*, Oliver v. United States, 466 U.S. 170, 178, 183 (1984) (a person has no expectation of privacy in his "open fields," and thus government agents may trespass in their investigation, since "[t]he existence of a property right is [now] but one element in determining whether expectations of privacy are legitimate."); Smith v. Maryland, 442 U.S. 735, 741 (1979) (police are permitted to capture the numbers dialed by a person on his phone because he voluntarily conveyed them to the telephone company for the express purpose of placing a call); United States v. Miller, 425 U.S. 435, 442 (1976) (police can obtain a person's bank records from the bank because he voluntarily conveyed the information for the express purpose of banking); California v. Greenwood, 486 U.S. 335, 40 (1988) (police permitted to search garbage bags that were placed at the curb "for the express purpose of conveying it to a third party...."); United States v. Hedrick, 922 F.2d 396, 398 (7th Cir. 1991) (police permitted to seize and search trash placed in cans on a person's property within the curtilage of his home).

violation. Not surprisingly, the Supreme Court of North Carolina cited Prouse for the proposition that "the purpose of the Fourth Amendment 'is to impose a standard of reasonableness upon the exercise of discretion by government officials ... in order to safeguard the privacy ... of individuals against arbitrary invasions.'" 366 N.C. at 278-79 (notes omitted).

In Prouse, Justice White was careful not to prohibit **all** suspicionless stops, stating that "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663. The idea here was apparently that violating **one** motorist's rights is impermissible, but violating **every** motorists' rights is perfectly fine. This *dicta* from Prouse has later been used to justify all sorts of intrusive checkpoints by police that are based not on warrants, probable cause, or even "reasonable suspicion."[14]

Beginning in the 1990's, Justice Scalia began to lead the Court in a different direction. In Whren v. United States, 517 U.S. 806 (1996), Justice Scalia recited the Court's practice that "every Fourth Amendment case ... turns upon a 'reasonableness' determination, involves a balancing of all relevant factors." *Id.* at 817. However, Justice Scalia decided Whren as a case of black and white. He first stated that "[a]s a general matter, the decision to stop an automobile is reasonable where the police have

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[14] *See, e.g.*, Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoints); Illinois v. Lidster, 540 U.S. 419 (2004) (information gathering checkpoints).

probable cause...." *Id.* at 810. Then, he noted that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. Refusing to balance the state versus individual interests, Justice Scalia determined that, since "the officers had probable cause," that in and of itself "rendered the stop reasonable under the Fourth Amendment...." *Id.* at 819.

Finally, after 45 years of privacy-focused Fourth Amendment jurisprudence, the Court in United States v. Jones took a fresh look at the issue when it considered whether the warrantless use of a GPS tracking device on a vehicle violated the Fourth Amendment, without regard to the reasonableness of any expectation of privacy. 132 S.Ct. 945, 949, 953-54. The Court stated that "Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Id.* at 950. Rather, the Court announced a return to the property rights foundation of the Fourth Amendment which the Court stated had been for a time displaced — but not replaced — by privacy considerations. *Id.* at 952 ("[T]he Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test"). Justice Scalia recognized that "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise ... the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *Id.* at 949.

A year later, the Court continued what it began in Jones in Florida v. Jardines, 569 U.S. ___, 133 S.Ct.

1409 (2013). The Court ruled that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Id.* at 1417.

The court below never gives any consideration to the private property principles that form the basis of the Fourth Amendment. Instead, the court's opinion is based on notions of "reasonableness" and interest balancing — ideas that were not relied upon by this Court in Jones and Jardines.

Rather than being a fluid concept left to the judgment of judges, the word "unreasonableness" has a fixed meaning, and its application is to be ascertained by fixed principles. The reasonableness or unreasonableness of a search or seizure is determined by evaluating whether it violates a property right in "persons, houses, papers, and effects." If a property right is violated, the search is *per se* unreasonable. *See* Jardines, 133 S.Ct. at 1414-1417.

III. STOPPING AN AUTOMOBILE ON "REASONABLE SUSPICION" OF ACTIVITY THAT VIOLATES NO LAW IS *PER SE* UNREASONABLE, A VIOLATION OF THE FOURTH AMENDMENT.

The Founders determined that the property rights recognized in and secured by the Fourth Amendment are inviolate against any form of compromise by government. *See* Boyd v. United States, 116 U.S. 616, 626 (1886). Congress may not enact laws diminishing

these rights; executive officers, including the police, may not conduct any search or seizure which compromises these rights; and judges may not sanction unconstitutional searches or seizures for any reason, and certainly not in support of a general interest in "roadway safety." The Fourth Amendment could not be clearer on this point. It protects "[t]he right of the people to be secure" first and foremost "in their persons" but also in their "houses, papers, and effects, against unreasonable searches and seizures...." These rights "shall not be violated." *See, e.g.*, Jardines, 133 S.Ct. at 1414-15.

As to protection of "persons," by the law of nature, "every man has a property in his own person: this no body has any right to but himself." II J. Locke, Treatise of Government § 27, pp. 287-88 (P Laslett, ed., Cambridge Univ. Press 1988). Additionally, each person has a right to the fruits of the labor of his body, to acquire and dispose of his possessions, generally described as his houses, effects and papers. *Id.*, pp. 287-88. Therefore, no ruler can justly deprive a man of his property (including his person, houses, effects, and papers), unless it is for violation of some law to which he has by civil covenant consented. *See id.*, p. 287, n. §27.

Thus, any attempt by the government to intrude upon a man's person or other property by search or seizure depends first upon whether the person has engaged in an activity that would be against the criminal law — if the facts are as the government official reasonably believes those facts to be. *See* Ornelas v. United States, 517 U.S. 690, 696 (1996);

Delaware v. Prouse, 440 U.S. 648, 663 (1979). Only if an individual driving or riding in a car actually has violated a law can he be detained for that reason. Absent such activity, the government can have no property claim on a driver, passenger, or automobile superior to the property interests secured by the Fourth Amendment guarantee. The government having acquired no superior property interest in the person or the automobile, it has no right to stop the car.

The state supreme court decided the case based on the assumption that the officer incorrectly assumed that the statutes of North Carolina required a vehicle to have two functioning brake lights, not one. Pet. Br. 15. There was no claim whatsoever, nor could there have been, that the government had any superior property interest in either the automobile or its occupants. Thus, the officer lacked the essential legal predicate upon which to stop petitioner's automobile and to interfere with the automobile occupants' freedom of movement. If a police officer has no legal authority for stopping a person, he is no different from a common law trespasser, just as the FBI and D.C. Metropolitan Police Department were treated by this Court in Jones. *See* Jones at 949.[15]

The North Carolina officials contend that there was no violation of the Fourth Amendment because the

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[15] *See, e.g.*, Malcomson v. Scott, 23 N.W. 166, 168 (Mich. 1885) ("An officer of justice is bound to know what the law is, and if the facts on which he proceeds, if true, would not justify action under the law, he is a wrong-doer.").

officer's mistake was a reasonable one. But the Fourth Amendment standard of reasonableness is most assuredly not, as the state supreme court claimed, "a fluid concept" gauged by a "totality of the circumstances" standard of negligence, as if this were a personal injury tort case. 366 N.C. at 281. Rather, the reasonableness of a Fourth Amendment search or seizure is to be measured by whether the government official had a sufficient factual basis giving it a property interest superior to the private property interest of the person whose person, house, effects, or papers are being searched and/or seized. There being no such valid legal claim in this case, the seizure of the automobile was objectively and *per se* unreasonable under the Fourth Amendment.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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June 16, 2014

AMICUS CURIAE BRIEF

No. 13-604

IN THE
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NICHOLAS BRADY HEIEN,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the
North Carolina Supreme Court

BRIEF OF *AMICI CURIAE* – PROFESSORS CHARLES E. MACLEAN & ADAM LAMPARELLO IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici Charles E. MacLean and Adam Lamparello[1] are assistant professors at Indiana Tech Law School in Fort Wayne, Indiana. They teach and write in the areas of criminal law, criminal procedure, and constitutional law, and have an interest in the sound development of the law in this area. *Amici* believe that mistakes of law do not—and cannot—provide a basis upon which to support a showing of reasonable suspicion.

Together or separately, *Amici* have written a number of articles in the Fourth Amendment context.[2] In addition, *Amici* recently filed with this

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[1] All parties have consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, their law school, or their counsel made a monetary contribution to its preparation or submission.

[2] Adam Lamparello & Charles E. MacLean, *Back to the Future: Returning to Reasonableness and Particularity under the Fourth Amendment*, 99 IOWA L. REV. BULL. 101 (2014); Charles E. MacLean & Adam Lamparello, *Abidor v. Napolitano: Suspicionless Cell Phone and Laptop "Strip" Searches at the Border Compromise the Fourth and First Amendments*, 108 NW. U. L. REV. COLLOQUY 280 (2014); Charles E. MacLean, *Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age Unless Congress Continually Resets the Privacy Bar*, 24 ALB. L.J. SCI. & TECH. 47 (2014); Charles E. MacLean, *But Your Honor, A Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Searches of Cell Phone Memories Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 37 (2012).

Court an amicus brief[3] that involved the constitutionality of searches of an arrestee's cell phone incident to arrest.

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3 *Riley v. California* & *United States v. Wurie*, Brief of *Amici Curiae* Professors Charles E. MacLean & Adam Lamparello, Nos. 13-132, 13-212, 2014 WL 985093 (U.S. Mar. 10, 2014).

SUMMARY OF ARGUMENT

Reasonable suspicion of unlawful activity cannot be predicated on conduct that does not violate the law. Put differently, if reasonableness—or reasonable suspicion—is to mean anything, it means that apparent violations of the law must be based on actual violations of the law. The North Carolina Supreme Court's decision sends a message to drivers throughout the country that they cannot be wrong about what the law requires, even where law enforcement is wrong—dead wrong—about what the law proscribes.

Of course, innocent conduct may appear to be suspicious on some level but if the conduct giving rise to the suspicion is not prohibited by law, then reasonable suspicion of *unlawful* activity is not present. Indeed, if the reasonable suspicion standard is to meaningfully deter unlawful police conduct—and protect motorists from arbitrary deprivations of liberty—it should require that those responsible for enforcing the law must themselves comply with the law. That means knowing the difference between what the law prohibits and permits, particularly where that distinction is the foundation upon which an unsuspecting motorist can be seized, searched, and possibly arrested.

In North Carolina, for example, an officer should know that the law requires drivers to have one, not two, functioning rear stop lamps.[4] Where, as here, an

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[4] N.C. GEN. STAT. § 20-129(g) (emphasis added).

officer erroneously believed that two stop lamps were required, relied solely on that mistaken belief to stop, search, and ultimately arrest a motorist, the officer acted unreasonably because reasonable suspicion of *unlawful* conduct never existed. In holding that no Fourth Amendment violation occurred, the North Carolina Supreme Court's decision allows an officer's mistake of law—and purely innocent conduct—to establish objectively reasonable suspicion of unlawful conduct.

The court reached the wrong result. Law enforcement officers should be held to the same standard as ordinary citizens and not be permitted to benefit from a defense—ignorance of the law—that no criminal defendant may invoke, that tips the balance too far in law enforcement's favor, and that excuses an officer's mistake at the expense of an individual's Fourth Amendment rights. After all, our justice system should be characterized by fairness and equality, not arbitrariness and subjectivity.

Thus, reasonable *legal* justifications, not merely reasonable beliefs, should be required before a motorist is deprived of liberty. This is certainly not too much to ask of law enforcement, as the protection of public safety, the public's confidence in law enforcement, and the efficient administration of the law depends on officers knowing the difference between right and wrong.

Accordingly, *Amici* respectfully suggest that the Court adopt the following bright-line rule: Mistakes of law are unreasonable under the Fourth Amendment and cannot support a finding of reasonable suspicion for a vehicle stop unless there is

an adequate and independent legal basis to justify the stop.

As discussed below, a case-by-case approach in the absence of a bright line rule would fail to guide law enforcement or adequately protect citizens from unlawful police conduct. It would force lower courts to analyze factors such as the seriousness of an officer's mistake, whether an existing law is susceptible to different interpretations, and the likelihood that innocent conduct can reasonably be perceived as violating the law. This would result in an unworkable jurisprudence that fails to shield innocent conduct from the watchful eyes of law enforcement officers and fails to protect motorists from arbitrary deprivations of liberty.

For these reasons, the North Carolina Supreme Court's decision should be reversed.[5] If citizens are presumed to know and required to obey the law, those responsible for ensuring their safety should not be held to a lower standard. Ignorance of the law is no excuse. Mistakes of law are *ipso facto* unreasonable.[6]

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5 *See State v. Heien*, 737 S.E.2d 351 (N.C. 2013).

6 *See Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (Justice Story noting in his opinion for the Court the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally"); *see also Bryan v. United States*, 524 U.S. 184, 196 (1998) ("traditional rule that ignorance of the law is no excuse"); *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system"); *United States v. Hodson*, 77 U.S. (10

ARGUMENT

I. MISTAKES OF LAW ARE NEITHER REASONABLE NOR CONSTITUTIONALLY-PERMISSIBLE BASES FOR REASONABLE SUSPICION.

The "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809-10 (1996) (brackets added).

As such, law enforcement officers must have reasonable suspicion of unlawful activity before initiating a traffic stop. *See United States v. Valentine*, 232 F.3d 350, 353 (3d Cir. 2000) ("an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot") (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)); *see also Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"); *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (law enforcement "must have a particularized and

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Wall.) 395, 409 (1870) ("Everyone is presumed to know the law").

objective basis for suspecting the particular person stopped of criminal activity"); *United States v. Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000) (reasonable suspicion requires "a particularized and objective basis for suspecting the particular person stopped of criminal activity").[7]

The law recognizes three types of mistakes: (1) pure mistakes of law; (2) mistaken interpretations of law; and (3) mistakes of fact. Of those three, a defendant may only invoke mistake of fact as a defense to a criminal charge. Law enforcement officers may also rely on reasonable mistakes of fact to justify a traffic stop.

No defendant, however, may rely on mistake or ignorance of the law as a defense. Law enforcement officers should not be afforded this luxury either, because the principles that permit traffic stops despite mistakes of fact do not exist in the context of pure mistakes, or mistaken interpretations, of the law.

A. Pure Mistakes of Law Are *Per Se* Unreasonable.

A pure mistake of law exists where law enforcement bases suspicion on conduct that the law does not proscribe. For example, if a State changes

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[7] The Court has also held that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810. Under either formulation, the officer's conduct in this case was unreasonable.

the speed limit from 55 to 65 miles per hour, stopping a driver for going 61 miles per hour would be a pure mistake of law. Reasonable suspicion that "criminal activity is afoot" does not exist because the stop was not predicated on the violation of any law, particularly the law that the officer relied on to stop the vehicle. *Wardlow*, 528 U.S.at123; *see also United States v. McDonald*, 453 F.3d 958, 960-62 (7th Cir. 2006) ("[a]n officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law"); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) ("[f]ailure to understand the law by the very person charged with enforcing it is not objectively reasonable"); *United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002) ("[i]f an officer simply does not know the law, and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable").

The majority of circuit courts agree, holding that such conduct violates the Fourth Amendment. *See, e.g., United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006), *cert. denied*, 549 U.S. 1237 (2007) ("[s]tops premised on a mistake of law are generally held to be unconstitutional"); *United States v. Mosley*, 454 F.3d 249, 260 n.16 (3d Cir. 2006) ("[u]nlike a reasonable mistake of fact, a mistake of law negates reasonable suspicion and renders the stop illegal"); *United States v. Miller*, 146 F.3d 274, 277-79 (5th Cir. 1998) ("*Whren* provides ... officers broad leeway to conduct searches and seizures ... regardless of whether their subjective intent

corresponds to the legal justifications for their actions. But the flip side of that leeway is that the legal justification must be objectively grounded") (citing *Whren*, 517 U.S. at 813); *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000) ("[i]f an officer makes a traffic stop based on a mistake of law, the stop violates the Fourth Amendment"); *United States v. King*, 244 F.3d 736, 737-38 (9th Cir. 2001) ("[a] vehicle stop is unreasonable and unconstitutional when premised on the officer's mistaken belief that a placard hanging from the rearview mirror was illegal").[8]

Indeed, allowing officers' mistakes of law to justify vehicle stops "would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *United States v. Lopez-Soto*, 205 F.3d 1101, 1106-07 (9th Cir. 2000). Consequently, where the government, due to a mistake of law, cannot establish that a traffic law has been violated, "as a matter of law there [is] no objective basis justifying the traffic stop." *United States v. Raney*, 633 F.3d 385, 393-94 (5th Cir. 2011) (brackets added); *United States v. Nicholson*, 721 F.3d 1236, 1245 n.9 (10th Cir. 2013) ("courts make probable cause determinations by assessing the facts against the correct interpretation of the law").

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[8] The only Circuit to hold to the contrary to date has been the Eighth Circuit, which held that a mistake of law does not render a vehicle stop unconstitutional if the officer's mistake was "objectively reasonable." *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006).

Here, the law in North Carolina required drivers of motor vehicles to have "a stop lamp on the rear of the vehicle [that] may be incorporated into a unit with one or more other rear lamps."[9] Petitioner had a working stop lamp on the rear of his vehicle. He complied with the law.

But the officer did not know the law, and testified that he believed the statute required two working stop lamps.[10] This belief was not based on precedent from the North Carolina courts and was contrary to any reasonable reading of the statute's plain language. *See Twilley,* 222 F.3d at 1092 (stopping a motorist for not displaying two license plates was unreasonable when the law only required one). And the Petitioner's wholly innocent conduct was the sole basis upon which the Petitioner was stopped, searched, and arrested.

In other words, had the officer known that the law required only one rear stop lamp, yet stopped the vehicle anyway, the officer's conduct would have been unlawful. The result should not change and, in fact, applies with more force when the officer lacks such knowledge. After all, if a law enforcement

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[9] N.C. GEN. STAT. § 20-129(g) (brackets added).

[10] *Amici* submit that a plain reading of the statute demonstrates that the officer's belief was not objectively reasonable. Even though the North Carolina Supreme Court had not previously decided whether the statute requires one or two stoplights, the language *"a* stop lamp on the rear of the vehicle" cannot reasonably be construed as requiring more than a single stop lamp.

officer's subjective beliefs about whether conduct is unlawful can justify the seizure, search, or possible arrest of a person, then the reasonable suspicion standard no longer requires suspicion of unlawful conduct.

That lets law enforcement off the hook for violating the law and allows law-abiding motorists to suffer unreasonable deprivations of liberty—and privacy—based on innocent conduct. *See United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999) ("if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive").

B. Mistaken Interpretations of Law Are Not Sufficient to Establish Reasonable Suspicion of Unlawful Conduct.

The majority of circuit courts agree that mistaken interpretations of the law cannot support a showing of reasonable suspicion. *See Twilley*, 222 F.3d at 1096 ("in this circuit, a belief based on a mistaken understanding of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop").

Unlike a pure mistake of law, a mistaken interpretation of law relates to conduct that the law *may* prohibit, but involves a misunderstanding of the

specific conduct that is prohibited. For example, a state law may prohibit individuals from carrying explosives across state lines. An officer stops a vehicle after seeing a driver with an out-of-state license plate holding two bottle rockets, even though the state Supreme Court previously held that bottle rockets do not fall within the definition of "explosives." In this situation, the officer knew the law generally, but applied it to conduct that was held to be outside of its proscriptions.

The distinction between pure mistakes of law and mistaken interpretations of law can be summarized this way: assuming that the officer's mistaken understanding of the term "explosives" was correct, would there be a violation of law? Yes. With respect to a pure mistake of law, a correct interpretation is not possible because the conduct at issue is not prohibited.

Here, the officer's mistake constituted a pure mistake of law. No reasonable construction of a law requiring "*a* lamp on the rear of the vehicle," would support an interpretation that two stop lamps were required. The stop violated the Fourth Amendment.

The result should not change where an officer mistakenly interprets a law, even if that law is complex, unsettled, or ambiguous, or if the officer is unaware of case law interpreting one or more of its elements. *See Nicholson*, 721 F.3d at 1241 (nothing in our opinion in *Tibbetts* suggests we actually meant to limit this rule only to the mistaken understanding of "plain and unambiguous laws"). In such a situation, officers should exercise caution and clarify any uncertainties before making judgments

that affect the liberty of unsuspecting motorists. After all, law-abiding citizens should not bear the burden of an officer's mistake.

Indeed, if misinterpretations of the law could establish reasonable suspicion of unlawful conduct, the Fourth Amendment's reasonableness requirement—and individual liberty—would be thrust into mercurial waters. Factors such as the extent to which a particular law could be misinterpreted, the likelihood that similarly-situated officers would make the same error, and the context within which the misinterpretation was made, would lead to an uncertain jurisprudence and fails to adequately guide law enforcement. And law enforcement might be a little more aggressive if they knew that the law applies differently to them than it does the citizens they are responsible for protecting. That reduces a vehicle driver's liberty interest to an afterthought—and a recipe for arbitrariness. Thus, a bright-line rule—not a case-by-case approach—strikes the proper balance between the needs of law enforcement and the protection of every individual's right to be free from ungrounded—and unreasonable—suspicion.

Of course, there could conceivably be a handful of laws in the statutory and common-law galaxy that are susceptible to a reasonable misinterpretation by law enforcement. But the Court should not fashion a rule to accommodate an anomaly, just like it should not accommodate unreasonable conduct by those who have the opportunity and obligation to know the law.

C. Mistakes of Fact May, in Some Circumstances, Support a Finding of Reasonable Suspicion.

Mistakes of fact are not *per se* unreasonable. *See United States v. Miguel,* 368 F.3d 1150, 1153 (9th Cir. 2004) ("[a] mere mistake of fact will not render a stop illegal, if the objective facts known to the officer gave rise to a reasonable suspicion that criminal activity was afoot") (quoting *Mariscal,* 285 F.3d at 1131 (brackets in original)).

The difference between a mistake of fact and law is that the conduct in question would have been unlawful if it was consistent with the officer's belief. For example, a law enforcement officer may observe the passenger in a vehicle being attacked by the driver. The officer stops the vehicle, but discovers that the object being attacked was a wax dummy. In this situation, an officer's mistake of fact will not automatically render the search unreasonable. In those same jurisdictions, however, mistakes of law are unreasonable and violate the Fourth Amendment. *See, e.g., United States v. Harrison,* 689 F.3d 301, 309 (3d Cir. 2012) ("[u]nlike a mistake of fact, a search conducted pursuant to a police officer's mistake as to the governing law, even if reasonable, is not permitted under the Fourth Amendment").

This distinction is a sound one. It is one thing to be wrong about facts of which an officer has no prior knowledge, particularly where the officer must make a split-second decision about whether those facts raise a reasonable suspicion of unlawful conduct. It is

quite another to be unaware of or misunderstand the precise conduct that a particular law prohibits, and to base reasonable suspicion on a belief that the individual violated *that specific law*. At bottom, and as the mistake of fact defense demonstrates, the Fourth Amendment does not require law enforcement officers to be perfect. But it does require them to be prepared—and to know the law.

The instant case is illustrative. The officer's mistake resulted from an interpretation that the statute's plain language does not allow. Importantly, however, it is not enough for the Court to hold that *this* officer's conduct was unreasonable, but that in other contexts, an officer's mistake of law *may* be reasonable. As discussed above, such a rule would confuse, rather than clarify, the responsibilities of law enforcement, and compromise, rather than reinforce an individual's Fourth Amendment protections.

II. THE GENERAL PUBLIC SHOULD NOT BE REQUIRED TO KNOW MORE THAN THOSE WHO ENFORCE THE LAW.

The "ignorance of the law is no excuse" maxim originated based on pragmatic concerns that criminals might avoid a conviction by invoking a defense—ignorance of the law—that a defense that "ordinarily could not be refuted."[11]

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11 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.1, at 586 (1986); *United States v. Aguilar*, 883 F.2d 662, 673 (9th Cir. 1989) ("[i]t is axiomatic that

That same reasoning applies even more forcefully when an officer stops a vehicle for allegedly violating a law that does not exist or that does not outlaw the driving conduct the officer observed. First, it is unfair and unreasonable to hold an accused driver to a standard ("ignorance of the law is no excuse") incalculably higher than the standard ("a reasonable mistake of law by an officer is an adequate excuse") to which the North Carolina Supreme Court would have officers adhere.

Second, it would be virtually impossible for an accused to refute an officer's claim of mistake of law, thus allowing officers to stop a vehicle for any conduct, innocent or not, and claim the officers believed statutes precluded that conduct. Officers ought not be able to use such mistakes of law—reasonable or not—as a shield against the Fourth Amendment and as a sword against the general public.

Finally, if the law does not *actually* forbid the observed conduct, any vehicle stop that was based on that conduct could not have been based on probable cause or reasonable suspicion that the vehicle driver had violated any traffic law.

As the First, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits held, an officer's mistake of law renders the vehicle stop unreasonable—and unconstitutional.

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ignorance or mistake of law [on the part of an individual accused] is no defense").

III. WHERE LAW ENFORCEMENT MISTAKENLY INTERPRETS THE LAW, REASONABLE SUSPICION CAN ONLY BE JUSTIFIED IF THERE IS AN ADEQUATE, INDEPENDENT, AND LEGITIMATE BASIS FOR THE STOP.

Mistakes of law are rendered irrelevant only where there is an adequate, articulable, and independent basis for the stop.

In *United States v. Delfin-Colina*, the Third Circuit recognized that reasonable suspicion can exist despite mistakes of law where there are independent and articulable bases for the stop. 464 F.3d 392 (3d Cir. 2006). As the Third Circuit held, "a mistake of law is only unreasonable when the officer does not offer facts that objectively show that the identified law was *actually* broken." *Id.* at 399 (emphasis added). The Third Circuit stated as follows:

> [I]n situations where an objective review of the record evidence establishes reasonable grounds to conclude that the stopped individual *has in fact violated the traffic-code provision cited by the officer*, the stop is constitutional even if the officer is mistaken about the scope of activities actually proscribed by the cited traffic-code provision.

Id. (emphasis added).[12]

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12 The Third Circuit went too far, however, in holding that the mere appearance of a violation—where no violation has

Ultimately, the Fourth Amendment's protections against unreasonable searches and seizures, the fundamental guarantee of liberty, and a constitutional structure that constrains, rather than enables, unlawful state conduct, does not yield to the honorable but mistaken intentions of law enforcement. It is, has always been, and should continue to be the other way around.

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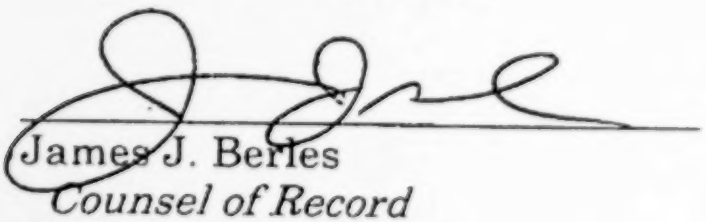
occurred—can, if based on an objectively reasonable belief, support a showing of reasonable suspicion. *See id.* ("an officer's Fourth Amendment burden of production is to (1) identify the ordinance or statute that he believed had been violated, and (2) provide specific, articulable facts that support an objective determination of whether any officer could have possessed reasonable suspicion of the alleged infraction"). This view represents the minority position, and for good reason. It allows reasonable suspicion to be triggered not by a violation of law or a mistake of fact, but by an erroneous and unreasonable belief.

CONCLUSION

For the foregoing reasons, the decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted,



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AMICUS CURIAE BRIEF

No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF NORTH CAROLINA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.

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IN THE

Supreme Court of the United States

No. 13-604

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF NORTH CAROLINA AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers, a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission. Letters granting blanket consent to the filing of amicus briefs are on file with the Clerk of Court.

accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL frequently appears as amicus in cases involving the Fourth Amendment, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is of central concern to Cato because the protections of the Fourth Amendment are part of the bulwark for liberty that the Framers set out in the Constitution.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more

than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court involving the meaning and scope of the Fourth Amendment, both as direct counsel and as amicus. Because this case directly implicates those questions, its proper resolution is a matter of concern to the ACLU and its members. The ACLU of North Carolina is a statewide affiliate of the national ACLU.

SUMMARY OF ARGUMENT

The Fourth Amendment prohibits searches and seizures, including traffic stops, absent "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). Yet Respondent asks this Court to affirm a rule condoning traffic stops based on suspicion of perfectly lawful conduct.

Amici submit this brief to emphasize two principal flaws in the North Carolina Supreme Court's approach: (1) It contradicts basic Fourth Amendment principles, improperly equating mistakes of fact with mistakes of law; and (2) if affirmed, it will have substantial negative consequences for both private citizens and law enforcement.

First, in contrast to the approach adopted by the majority of federal courts of appeals and state supreme courts to address the issue,[2] the North Carolina Su-

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[2] *See United States* v. *Nicholson*, 721 F.3d 1236, 1241-1242 (10th Cir. 2013); *United States* v. *McDonald*, 453 F.3d 958, 961-962 (7th Cir. 2006); *United States* v. *Chanthasouxat*, 342 F.3d 1271, 1279-1280 (11th Cir. 2003); *United States* v. *King*, 244 F.3d 736, 741-742 (9th Cir. 2001); *United States* v. *Miller*, 146 F.3d 274, 278-

preme Court's decision overlooks the important doctrinal and practical differences between mistakes of fact and mistakes of law.

From a doctrinal perspective, the court's approach neglects the distinct roles fact and law play in the Fourth Amendment analysis. The factual component of the analysis requires an empirical assessment and the exercise of judgment: Did the facts reasonably support the officer's belief that the suspected individual was engaged in criminal activity?

The legal component, meanwhile, is categorical: Was the suspected act a crime? The legal rule—the "infraction itself," *Whren* v. *United States*, 517 U.S. 806, 818 (1996)—is the indispensable objective basis against which law enforcement, and courts, must evaluate observed facts.

Conflating mistakes of fact and law not only threatens to undermine this basic framework, but raises other doctrinal concerns, including by destroying the symmetry between citizens (who are presumed to know the law) and law enforcement officials (who, under the North Carolina Supreme Court's approach, are not).

The decision of the North Carolina Supreme Court also overlooks the practical, real-world reasons why the Fourth Amendment treats fact and law differently. Because the facts confronting law enforcement officials are often ambiguous, unique in each instance, and analyzed "on the fly," this Court's Fourth Amendment ju-

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279 (5th Cir. 1998); *State* v. *Louwrens*, 792 N.W.2d 649, 652-653 (Iowa 2010); *Martin* v. *Kansas Dep't of Revenue*, 176 P.3d 938, 948 (Kan. 2008); *Hilton* v. *State*, 961 So. 2d 284, 297-299 (Fla. 2007); *State* v. *Anderson*, 683 N.W.2d 818, 823-824 (Minn. 2004); *State* v. *Lacasella*, 60 P.3d 975, 981-982 (Mont. 2002).

risprudence recognizes that such officials' judgments regarding the facts will not be accurate in every case. Enforceable legal rules, by contrast, possess none of these characteristics.

Second, the North Carolina Supreme Court's rule will have significant negative consequences, not only for private citizens charged with obeying the law, but also for government officials charged with enforcing it.

The rule creates new and unjustified burdens on private citizens by sanctioning an expansive new category of traffic stops, together with the "physical and psychological intrusion" such stops necessarily entail, *Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979), in every case where non-frivolous questions of statutory interpretation exist. Nor is there any reason to be confident that the effect of the North Carolina rule can be confined to traffic stops. Its logic extends equally to all cases involving government intrusions based on reasonable suspicion, and indeed all those based on probable cause.

At the same time, the North Carolina Supreme Court's rule threatens to undermine law enforcement. It understates the importance of legal training for law enforcement officials, as well as diminishing the public perception of law enforcement officials' knowledge and authority. By contrast, the majority rule imposes no significant burden on law enforcement: It simply applies to law enforcement officials the same obligation to know and obey the law that applies to all citizens.

"[A]s this Court has always recognized, '[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear

and unquestionable authority of law.'" *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891)). The North Carolina Supreme Court's rule authorizes government intrusions based on no law at all, and this Court should reject it.

ARGUMENT

I. THE NORTH CAROLINA SUPREME COURT'S RULE IGNORES FUNDAMENTAL DIFFERENCES BETWEEN MISTAKES OF FACT AND MISTAKES OF LAW

The decision below treats police mistakes of law and of fact as functionally equivalent under the Fourth Amendment. In so doing, it ignores the important doctrinal and practical differences between the two.

A. Treating Mistakes Of Fact And Law "The Same" Under The Fourth Amendment Contravenes Well-Established Legal Doctrine

In requiring courts to treat all law enforcement mistakes "the same," the North Carolina Supreme Court "decline[d] to create" what it apparently saw as a novel distinction between fact and law. Pet. App. 18a. Recognition of the fundamental distinction between fact and law, however, is a critical element of this Court's Fourth Amendment jurisprudence. Ignoring the distinction disturbs that framework and raises important doctrinal concerns.

In *Brinegar* v. *United States*, 338 U.S. 160, 177 (1949), this Court explained that police may not stop "traveler[s] along the public highways" based on "whim, caprice, or mere suspicion." *Brinegar* applied a "probable cause" standard, under which the "'facts and circumstances within [a law enforcement official's]

knowledge'" must give rise to a particularized suspicion that "an offense has been or is being committed." *Id.* at 175, 176. Since *Brinegar*, the Court has clarified that the constitutional standard governing traffic stops is "reasonable suspicion," but the basic analysis is the same: "[B]rief investigative stops" are permitted when, based on the "'totality of the circumstances,'" a law enforcement official "has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Navarette* v. *California*, 134 S. Ct. 1683, 1687 (2014) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981)).[3]

Subsequent decisions clarify the two-part test used to determine whether reasonable suspicion (or probable cause) exists. The first element focuses on identifying the facts and circumstances known to the officer. *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996); *see also Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004) ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."). Once the relevant facts have been "'admitted or established,'" the second step involves weighing the facts against the pertinent legal standard, which is presumed to be "'undisputed,'" and determining whether those facts permitted law enforcement officers reasonably to suspect a violation. *Ornelas*, 517 U.S. at 696 (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982)).

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[3] The "only difference" between the probable cause and reasonable suspicion standards is "the level of suspicion that must be established." *Alabama* v. *White*, 496 U.S. 325, 330-331 (1990). Under the reasonable suspicion standard, the "likelihood" of criminal activity need not be as high as required for probable cause. *See United States* v. *Arvizu*, 534 U.S. 266, 274 (2002).

The legal standard against which the facts and circumstances are judged does not depend upon what was known to the officer. Instead, it is based on the "infraction itself." *Whren* v. *United States*, 517 U.S. 806, 818 (1996); *accord Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979) ("Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law."). The question is not whether the facts could have caused a law enforcement official to perceive a violation of a law he reasonably believed to exist; it is whether the facts could have given rise to reasonable suspicion of a violation of an actual law. *See, e.g., Cortez*, 449 U.S. at 417 ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."); *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979) ("When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis [for a stop.]" (footnote omitted)).

To say, as the North Carolina Supreme Court has, that an officer may lawfully base a stop on his own mistaken interpretation of the law—no matter how well-intentioned or reasonable—offends this Court's precedents. That approach disregards *Whren*'s dictate that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U.S. at 813. It further contravenes this Court's rule that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Devenpeck*, 542 U.S. at 153. And it undercuts the Court's goal of avoiding a rule that would allow the

Fourth Amendment's protection to "vary from place to place and from time to time." *Whren*, 517 U.S. at 815.

The North Carolina Supreme Court's equation of fact and law also destroys the symmetry between the expectations placed on police officers and citizens. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). This rule is perhaps nowhere more rigorously enforced than in the context of traffic violations, as citizens are presumed to know and understand the laws in every jurisdiction in which they drive. Thus, the North Carolina Supreme Court's rule exempts police officers from the ambit of the presumption exactly when it is most likely to vindicate constitutional protections.

B. There Are Important Practical Distinctions Between Mistakes Of Fact And Mistakes Of Law

There are sound practical reasons for the different roles played by law and fact in determining whether reasonable suspicion existed for a stop. Courts' more flexible approach to mistakes of fact is grounded in several considerations: the ambiguous nature of the facts confronting law enforcement officials as they investigate suspected criminal activity; the uniqueness of the facts presented in any given case; the necessity for law enforcement officials to make factual judgments "on the fly"; and the relative expertise law enforcement officials possess in making such judgments. None of these considerations supports adopting a similarly flexible approach to mistakes of law.

First, the Fourth Amendment is not offended by a law enforcement official's reasonable mistake of fact

because factual scenarios are often "more or less ambiguous." *Brinegar*, 338 U.S. at 176. Officers must judge each such scenario based on "conclusions of probability." *Id.* In doing so, they aggregate countless factual observations, make credibility determinations, and assess the intricacies of human behavior.[4] That such probabilistic judgments will result in the investigation of some innocent behavior is unfortunate, but unavoidable. *See id.*; *see also Illinois* v. *Gates*, 462 U.S. 213, 232 (1983) (officers must "assess[] ... probabilities in particular factual contexts"); *Cortez*, 449 U.S. at 418 ("Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.").

The interpretation of criminal statutes, by contrast, requires no such probabilistic assessment or subtle behavioral analysis. Rather, the law is considered to be "definite and knowable." *Cheek*, 498 U.S. at 199. Indeed, when a criminal law is not sufficiently definite, it is unconstitutional. *See generally Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

Second, reasonable mistakes of fact occur in part because of the uniqueness of the "myriad factual situations" in which they arise. *Cortez*, 449 U.S. at 417. The reasonableness of any particular search or seizure is

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[4] For example, in *Cortez*, officers discovered and then followed a series of footprints in the desert near the Mexican border to a highway, and then, layering factual observations, information from their own experience about the area, common-sense inferences about patterns of human behavior, and observations of passing vehicles, concluded that a particular van was likely transporting undocumented aliens. 449 U.S. at 419-421.

"completely dependent on the specific and usually unique circumstances presented by each case." *United States* v. *Chanthasouxat*, 342 F.3d 1271, 1277 (11th Cir. 2003); *see also Terry* v. *Ohio*, 392 U.S. 1, 15 (1968) ("[n]o judicial opinion can comprehend the protean variety of the street encounter"). In light of the endless variability of factual scenarios, it is unrealistic to expect officers to assess the facts accurately in every case. *See Illinois* v. *Rodriguez*, 497 U.S. 177, 185-186 (1990).

In contrast, the meaning of a criminal statute does not change depending on the facts to which it is applied. Thus, while different officers may reasonably draw different inferences in various factual scenarios, officers must apply the same understanding of the law to the facts they encounter. *See United States* v. *Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) ("failure to understand the law by the very person charged with enforcing it is *not* objectively reasonable"); *United States* v. *Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (police should "properly understand the law that they are entrusted to enforce and obey"). To be sure, circumstances will occasionally arise that test an officer's understanding of a statute, but the correct course in that situation is for the officer to clarify that understanding, not to excuse himself from the duty to know the law he is enforcing. *See United States* v. *Nicholson*, 721 F.3d 1236, 1243 (10th Cir. 2013) (stating that "one would hope that a law enforcement official would clarify his understanding of any unclear provision before bringing the full force of the law upon an unsuspecting citizen").

Third, reasonable mistakes of fact are a consequence of the reality that officers are frequently required to make factual determinations under significant time pressure. As this Court has explained in applying the Fourth Amendment reasonableness standard to a

police officer's use of force, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989). Similarly, in the case of traffic stops, officers often must make factual determinations in a split second as cars speed past. *See, e.g., United States* v. *Cashman*, 216 F.3d 582, 586-587 (7th Cir. 2000) (observing cracked windshield in passing car).

Officers also often face imminent danger in the field—danger they do not face at the station house or in the courthouse. *See Terry*, 392 U.S. at 28 (officer "in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger"). Demanding factual perfection in such circumstances is not merely unrealistic, but potentially dangerous.

In contrast, officers do not (or at least should not) arrive at legal conclusions "on the scene." *Graham*, 490 U.S. at 396. Rather, it is presumed that officers will have an opportunity to study the law in advance of enforcing it and will do so. *See Nicholson*, 721 F.3d at 1244 (officer could have "learn[ed] a definitive meaning [of the law] before acting"). Legal interpretations, unlike factual conclusions, are a function of diligent prior study and training—not split-second decision-making.

Fourth, and finally, law enforcement officials are permitted to proceed based on reasonable, probabilistic factual judgments because they are presumed to have special expertise in formulating such judgments. When an officer draws deductions from facts that might be "meaningless to the untrained," he is engaged in precisely "the kind of police work often suggested by judg-

es and scholars as examples of appropriate and reasonable means of law enforcement." *Cortez*, 449 U.S. at 419.

This rationale does not extend to legal judgments. Indeed, the North Carolina Supreme Court appears to have reached its decision on precisely the opposite ground, noting that officers are "'not legal technicians,'" Pet. App. 16a (quoting *Ornelas*, 517 U.S. at 695), *i.e.*, *not* experts on the law. Under its approach, police officers would be permitted to make reasonable mistakes of fact because they, and not the courts, are experts on the facts, and would be permitted to make reasonable mistakes of law because they, unlike courts, are *not* experts on the law—a nonsensical result.

II. THE NORTH CAROLINA SUPREME COURT'S RULE WOULD HAVE NEGATIVE CONSEQUENCES FOR BOTH INDIVIDUAL CITIZENS AND LAW ENFORCEMENT

This Court has recognized that "determinations of 'reasonableness' under the Fourth Amendment must take account of ... practical realities." *Wyoming* v. *Houghton*, 526 U.S. 295, 306 (1999). If permitted to stand, the rule adopted by the North Carolina Supreme Court will have negative practical consequences for individual citizens charged with obeying the law and for government officials charged with enforcing it.

A. The North Carolina Supreme Court's Rule Will Have Negative Consequences For Individual Liberty

The North Carolina Supreme Court's rule in practice will enable an expansive new category of government intrusions. If the Fourth Amendment inquiry hinges on the reasonableness of police officers' beliefs about the law, such intrusions may be justified based on

all manner of innocent conduct, so long as the state raises, post-hoc, a non-frivolous question of statutory interpretation.

This concern is particularly pressing in the context in which the rule arises: traffic stops, which already affect millions of Americans every year. In 2011, more than 20 million Americans (about 10 percent of all drivers over the age of 16) were stopped by law enforcement while driving. Langton & Durose, *Police Behavior during Traffic and Street Stops, 2011* at 3 (Sept. 2013), *available at* http://www.bjs.gov/content/pub/pdf/pbtss11.pdf. Such encounters occur against a backdrop of extensive legal rules. As this Court has noted, motorists are subject to a "multitude of ... traffic and equipment regulations." *Prouse*, 440 U.S.at 661; *see also Nicholson*, 721 F.3d at 1243 (noting the "vast number of local, state, and federal laws [that can] trigger criminal liability"). The North Carolina Supreme Court's rule threatens to complicate the backdrop still further, and increase the already vast number of traffic stops, by permitting motorists to be stopped based not only on unlawful conduct, but also based on *lawful* conduct that might reasonably be thought to violate any of these multitudinous regulations.

Case law reveals a wide variety of lawful conduct that has been wrongly (though perhaps reasonably) determined to violate such regulations, serving as the basis for a traffic stop. Examples include the lawful use of a turn signal, *United States* v. *McDonald*, 453 F.3d 958, 960-962 (7th Cir. 2006); *United States* v. *Miller*, 146 F.3d 274, 277-278 (5th Cir. 1998), the lawful use of headlamps during the daytime, *United States* v. *DeGasso*, 369 F.3d 1139, 1143-1144 (10th Cir. 2004), a lawful turn or U-turn, *Nicholson*, 721 F.3d at 1240; *State* v. *Louwrens*, 792 N.W.2d 649, 650 (Iowa 2010), the lawful

placement of a rearview mirror, *see Chanthasouxat*, 342 F.3d at 1278, the lawful placement of a license plate or registration sticker, *United States* v. *Southerland*, 486 F.3d 1355, 1359 (D.C. Cir. 2007); *Lopez-Soto*, 205 F.3d at 1106-1107, and the lawful use of mud flaps, *Tibbetts*, 396 F.3d at 1138 & n.4. Under the North Carolina Supreme Court's approach, any of these perfectly legal activities could support a finding of reasonable suspicion for a stop.

Such stops not only constitute a "physical and psychological intrusion," *Prouse*, 440 U.S. at 657, but also commonly lead (as in the case at bar) to other, more serious consequences, *e.g.*, searches and seizures. Thus, expanding the power of the state to conduct traffic stops beyond the boundaries established under the majority approach (*i.e.*, based on reasonable suspicion of a violation of an actual law) will enable a new class of liberty-burdening intrusions, none of them justified.

Moreover, the North Carolina Supreme Court's rule has the potential to reach beyond vehicle stops. In principle, it can apply in *all* cases where reasonable suspicion is required. *Cf. Whren*, 517 U.S. at 818-819 (refusing to create a Fourth Amendment rule specific to traffic stops). Courts also might apply the rule in cases involving far more profound state intrusions (*e.g.*, arrests) based upon legally incorrect determinations of probable cause. There is no principled distinction between the structure of the reasonable suspicion and probable cause standards: They simply require different levels of proof. *See supra* n.3. Thus, if reasonable suspicion of conduct that is not actually unlawful could justify a vehicle stop, then probable cause to believe the same lawful conduct is occurring arguably would too—and indeed, courts have already adopted this view. *See, e.g., United States* v. *Washington*, 455 F.3d

824, 827 (8th Cir. 2006) ("In our circuit, if an officer makes a traffic stop based on a mistake of law, the legal determination of whether probable cause or reasonable suspicion existed for the stop is judged by whether the mistake of law was an 'objectively reasonable one.'"). Under the North Carolina Supreme Court's rule, objectively innocent conduct may lead not only to vehicle stops, but to searches, arrests, and interrogations—all arising from conduct not prohibited under any applicable law.

Wherever mistakes of law are tolerated under the Fourth Amendment, the result will be a heavy burden on private citizens' liberty. Citizens who wish to avoid the intrusion of police searches or seizures will be compelled not only to obey the law, and not only to avoid arousing suspicion of a violation through conduct that appears unlawful, but also to avoid arousing suspicion of any activity that could reasonably be *construed* as illegal. The task will be a difficult one because mistakes of law arguably are at their most "reasonable" in the context of low-level, *malum prohibitum* offenses (*e.g.*, motor vehicle regulations) as to which "the wrongfulness of behavior is not self-evident, [and] the only recourse for citizens is to generally familiarize themselves with the ... codes." Logan, *Police Mistakes of Law*, 61 Emory L.J. 69, 91-92 (2011). Permitting mistakes of law by police officers, as the North Carolina Supreme Court has done, "neutralizes even this basic planning possibility." *Id.* at 92.

To be sure, the Fourth Amendment contemplates that citizens sometimes will bear the burden of government intrusions based on reasonable suspicion (or probable cause) even though no crime has occurred. *See, e.g.*, *Terry*, 392 U.S. at 21 (balancing the government's "'need to search'" against the intrusion on the

individual); *see also Illinois* v. *Wardlow*, 528 U.S. 119, 126 (2000). The Fourth Amendment allows such intrusions based on reasonable suspicion, even where such suspicion is based on a mistake of fact, because the burden such intrusions impose on citizens is deemed justified as a means of avoiding the social cost of unlawful conduct. But *lawful* conduct by definition imposes no such social cost, and no societal interest is served by preventing citizens from engaging in activity that neither actually nor apparently violates any law.

Citizens who wish to engage in activities that are highly regulated or otherwise likely to attract police attention may face state intrusion even if they carefully research when, where, and how they are permitted to conduct their desired activity. Even more casual activities, though legal, may form the basis for stops, searches, and seizures:

- A man is standing on a public sidewalk and "leaning against a wall" of a building. An officer mistakenly believes that leaning against the wall violates an anti-loitering ordinance, never before interpreted by a court. In fact the ordinance bars only the specific acts identified in a sign on the premises, such as sleeping in the building's doorway. The man is stopped and searched. *United States* v. *Hammond*, 2010 WL 1998691, at *1-4 (N.D. Cal. May 18, 2010).

- A man is lawfully holding an open, partially full beer bottle and walking from his house to a trash can in order to throw the bottle out. Two officers incorrectly believe that the city's open container law prohibits "carrying open alcoholic beverages in public"; it does not. The man is

stopped and searched. *United States* v. *Tyler*, 512 F.3d 405, 407-408, 410-411 (7th Cir. 2008).

- A man is lawfully walking down a street that has no sidewalk. An officer mistakenly believes that walking in the street violates an ordinance prohibiting jaywalking. The man is stopped and searched. *United States* v. *Davis*, 692 F. Supp. 2d 594, 596-597, 600-601 (E.D. Va. 2010).

Under the North Carolina Supreme Court's rule, *none* of these scenarios violates the Fourth Amendment. The mistake-of-law rule will diminish the Fourth Amendment, allowing state intrusions upon private citizens in a broad range of cases where citizens are suspected of conduct erroneously believed to be criminal.[5]

Respondent has suggested that the North Carolina Supreme Court's rule does not apply where an officer's understanding of the substantive law is contradicted by the "plain and easily understood language of a statute" or the statute's meaning has been "decisively address[ed]" by the courts. Opp. 19. Even so construed, however, the rule extends to a wide array of cases: all those where objectively reasonable legal arguments exist regarding the proper interpretation of a statute. Petitioner's case illustrates why. The brake light statue at issue here was neither insolubly ambiguous nor unconstitutionally vague; rather its meaning was held to be clear as a matter of plain text. Pet. App. 34a ("[T]he plain language of subsection (g) requires only one stop lamp on a vehicle."). Like countless state and

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[5] The impact of a rule condoning mistakes of law will be greater in light of the fact that mistakes of law are often widely repeated. In *Chanthasouxat*, for example, an officer issued "over 100 tickets" for a non-existent traffic offense. 842 F.3d at 1278.

federal criminal statutes, and presumably most motor vehicle code provisions, the brake light statute simply had not been interpreted by an appellate court. A definition of ambiguity that encompasses the brake light statute here will encompass any statute as to which interpretive questions might remain outstanding.

As Justice Story explained, "[t]here is scarcely any law which does not admit of some ingenious doubt." *Barlow* v. *United States*, 32 U.S. (7 Pet.) 404, 411 (1833). Or, as Justice Frankfurter put it: "Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947). A rule that "only" applies where there are objectively reasonable arguments about statutory interpretation is a rule that will apply very frequently and will as a consequence expand dramatically the state's police power at the expense of citizens' liberty.

The North Carolina Supreme Court's rule works no better if confined to only truly ambiguous statutes. *First*, as just explained, that characterization does not match the facts of this case, where the "stop lamp" statute's meaning was plain—it just required a technical reading of the statute. *Second*, and in any event, requiring some unspecified degree of ambiguity would do little to cabin a mistake-of-law rule because it would still allow (and encourage) any and all mistake-of-law arguments, forcing judges to make a standardless determination about how much ambiguity is required to permit an objectively reasonable legal mistake in a given case. *Third*, the idea that a mistake-of-law rule only applies to the most ambiguous criminal statutes effec-

tively sanctions unconstitutional vagueness. *See Papachristou*, 405 U.S. at 162.[6]

B. The North Carolina Supreme Court's Rule Will Undermine Law Enforcement

The substantial burden imposed on individuals under the North Carolina Supreme Court's rule will not be justified by any benefit to law enforcement. The majority approach imposes the same straightforward and time-honored obligation on police officers and private citizens alike: knowledge of and obedience to the law. In contrast, the North Carolina Supreme Court's rule, by allowing state intrusions that have no basis in law, undermines the legitimacy of law enforcement and threatens officer safety.

In rejecting the majority approach, the North Carolina Supreme Court asserted that expecting law enforcement officers to know the law amounts to requiring "omniscien[ce]." Pet. App. 16a. It would indeed require omniscience to presume that law enforcement officials have perfect knowledge of the *facts*, which is why state intrusions based on reasonable mistakes of fact may occur without violating the Fourth Amendment. But presuming knowledge of the law requires

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[6] In analogous circumstances, the principle of lenity requires that criminal prohibitions whose meaning is uncertain be construed in favor of individual defendants. *See United States* v. *Bass*, 404 U.S. 336, 347-348 (1971). Under the North Carolina Supreme Court's rule, by contrast, ambiguity in a criminal statute may be used *against* an individual defendant—as occurred in the case at bar. *Cf. Chanthasouxat*, 342 F.3d at 1278-1279 (rejecting mistake-of-law rule: "Even if the statutes were ambiguous, that ambiguity could not help the government's case. This is because the government asks us to use the alleged ambiguity of a statute *against* a defendant.").

only that a basic presumption applicable to all citizens apply equally to those who enforce the law.

The majority approach also creates positive incentives that are consistent with that presumption. "Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Davis* v. *United States*, 131 S. Ct. 2419, 2429 (2011). By making clear to officers that the Fourth Amendment protects individuals from government intrusions not actually authorized by the law, the majority approach provides incentives for police officers to achieve and maintain familiarity with the law, and encourages those who train and otherwise inform police officers of legal requirements to convey information that is clear, correct, and current. It also eliminates any incentive for police officers and departments to exploit circumstances in which the correct interpretation of a law is clear but subject to reasonable misinterpretations. *Cf. Brendlin* v. *California*, 551 U.S. 249, 263 (2007) (rejecting rule that would "invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal"); *United States* v. *Johnson*, 457 U.S. 537, 561 (1982) (refusing a rule that would "'encourage police ... to adopt a let's-wait-until-it's-decided approach.'" (quoting *Desist* v. *United States*, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting))).

In contrast, the North Carolina Supreme Court's rule could have negative consequences for law enforcement, undermining law enforcement legitimacy and potentially endangering officer safety. *First*, the rule diminishes incentives to ensure that law enforcement officials receive thorough and up-to-date training in the law. *See Nicholson*, 721 F.3d at 1242 ("Permit-

ting officers to excuse their mistakes of substantive law as 'reasonable' 'would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey.'" (quoting *Lopez-Soto*, 205 F.3d at 1106)). *Second*, the rule may damage the public perception of law enforcement's knowledge and authority, discouraging citizens from obeying or cooperating with police and alienating law enforcement officials from those they serve. *See* Bayley, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 Criminology & Pub. Policy 133, 141-142 (2006) ("[V]iolating the rule-of-law lessens the willingness of the public to assist the police in carrying out their assigned role."); Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 323 (2003) ("Evidence suggests that a core element to the creation and maintenance of [appropriate] social values is the judgment that legal authorities exercise their authority following fair procedures."). These negative consequences may even impact officer safety, by encouraging citizens to dispute the law with officers who are no longer presumed to understand it. *Cf. Bad Elk* v. *United States*, 177 U.S. 529, 537-538 (1900) (describing historical common law right to resist unlawful arrest).

Citizens are entitled to trust that government intrusions upon their privacy are grounded in the law. Such an intrusion, though based on a mistake of fact, may be justified based on law enforcement officials' need to investigate crime in an uncertain and rapidly changing environment. No similar rationale supports a lenient approach to legal errors. The North Carolina Supreme Court's rule ignores the important distinction between fact and law, sanctioning a wide range of im-

permissible and harmful intrusions. This Court should reject that approach.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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JUNE 2014

AMICUS CURIAE BRIEF

No. 13-604

In The Supreme Court of the United States

NICHOLAS BRADY HEIEN,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the
North Carolina Supreme Court

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)[2], and *Safford Uniform School District No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the right to be free from prosecution and conviction based on evidence obtained from unconstitutional traffic stops.

SUMMARY OF THE ARGUMENT

Reduced to its core, the issue that confronts this Court is simple: may this country's citizens be

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with this Court consenting to the filing of *amicus curiae* briefs.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for The Rutherford Institute as *Amicus Curiae*).

held to an all-knowing standard of what the law is whereby if they are wrong—despite their objectively reasonable belief to the contrary—they are subject to criminal liability (including possible incarceration), but the government is allowed to benefit from its agents' own mistakes of law?

Because there is no legal, principled, or logical basis for treating citizens differently from government agents, it is not surprising that the distinct majority of courts that have faced the issue presented in this case have held that a traffic stop based on a mistake of law violates the Fourth Amendment. *See, e.g.*, *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) ("Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional.")[3] This premise is particularly justified under contemporary circumstances. The increased professionalism of law enforcement personnel, combined with the array of technology available to officers to determine substantive law, negates any purported justification for permitting traffic stops based on officers' mistakes of law.

Moreover, empirical evidence demonstrates that if the decision of the North Carolina Supreme

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[3]*See also United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000) ("[An officer's] belief based on a mistaken understanding of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop."); *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006) ("when no violation actually occurred, it is not objectively reasonable"); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) ("failure to understand the law by the very person charged with enforcing it is *not* objectively reasonable.") (emphasis in original).

Court is upheld, there will be little benefit to public safety; to the contrary, the privacy and security of our nation's citizens will be significantly harmed. Furthermore, these effects will almost certainly be felt disproportionately by those groups historically discriminated against, who will have little, if any, recourse. As such, the decision of the North Carolina Supreme Court should be reversed.

ARGUMENT

I. The Increased Professionalism Of Law Enforcement And Technological Advances Militate Against Allowing Traffic Stops Based On Mistakes Of Law

The Fourth Amendment serves, in part, to guard against the abuses of the Colonial era "general warrant," which allowed officers of the English Crown to "search where they pleased." *Stanford v. Texas*, 379 U.S. 476, 482 (1965). Since then, a long line of cases—from the nineteenth, twentieth, and twenty-first centuries—have repeatedly recognized that the government may not benefit from its agents' mistakes of law. *See, e.g.*, *Malcomson v. Scott*, 23 N.W. 166, 168 (Mich. 1885) ("An officer of justice is bound to know what the law is, and if the facts on which he proceeds, if true, would not justify action under the law, he is a wrong-doer."); *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (noting "the fundamental unfairness of holding citizens to the 'traditional rule that ignorance of the law is no excuse,' . while allowing those 'entrusted to enforce' the law to be ignorant of it") (citation

omitted). Indeed, if Justice Holmes could justify the "larger interests on the other side of the scales" for refusing to excuse the mistakes of law of laypersons, the scales must tip overwhelming against the government when its agents make similar mistakes. OLIVER WENDELL HOLMES, THE COMMON LAW 41 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). This is particularly so because the criminal law's audience is primarily law enforcers, not laypersons. *See* William J. Struntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) ("Criminal codes therefore do not and cannot speak to ordinary citizens directly. For the most part, criminal law regulates actors in the legal system, while popular norms—morals—regulate the conduct of the citizenry.").

Partly as a result of judicial decisions restricting certain police practices (including prohibiting traffic stops based on mistakes of law), our nation's law enforcement departments have become increasingly professional and knowledgeable of the law. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (finding a lessened need for the exclusionary rule given "the increasing professionalism of police forces" and "wide-ranging reforms in the education, training, and supervision of police officers.") (internal citation and quotation marks omitted). For example, today it is common for law enforcement agents to have tools (including dashboard computers) providing access to the pertinent law, including direct communication with personnel versed in the law. *See, e.g.*, Michelle Perin, *Big Stuff in a Small Package*, LAW ENFORCEMENT TECH., Apr. 2010, at 26 (discussing

the use of mobile computers by police on street patrol).

Such progress should not be undermined by providing officers any incentive to eschew best practices. As the California Supreme Court recognized over thirty years ago, doing so "would provide a strong incentive to police officers to remain ignorant of the language of the laws that they enforce and of the teachings of judicial decisions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct." *People v. Teresinski*, 640 P.2d 753, 758 (Cal. 1982) (in bank).[4] Nothing has changed so significantly since this decision which would warrant this Court in condoning traffic stops based on officers' mistakes of law. To the contrary, police officers are far better equipped to know or determine the law than they were at the time *Teresinski* was decided. As such, mistake-of-law traffic stops are even less justifiable today.

II. Traffic Stops Based On Mistakes Of Law Endanger Constitutional Rights And Do Not Serve A Societal Benefit

Allowing law enforcement wide latitude to make mistakes of law will also have the effect of encouraging and increasing the number of legally baseless searches. *See* Eugene Volokh, *The*

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[4] *See also* Pet'r's Br. at 10 ("Most notably, police departments would be discouraged from using resources at their disposal to ensure that officers on patrol have an accurate understanding of the law.").

Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026, 1105–14 (2003) (discussing "small change tolerance slippery slopes"). Law enforcement personnel would be incentivized to stop citizens in the hope of finding damning evidence. In return, an officer would simply have to come up with a *post hoc* rationale to demonstrate that he or she was mistaken.

The concerns are particularly acute given the potential rewards—including professional advancement—associated with the discovery of evidence. *See Johnson v. United States*, 333 U.S. 10, 14 (1948) (police officers are "engaged in the often competitive enterprise of ferreting out crime"). Consequently, it is imperative that significant checks are in place to prevent overzealous policing. *See Davis v. United States*, 131 S. Ct. 2419, 2435 (2011) (Sotomayor, J., concurring) ("[W]hen police decide to conduct a search or seizure in the absence of case law (or other authority) exclusion of the evidence obtained may deter" violations of law).

Such checks are particularly important given that law enforcement personnel can already, in effect, effectuate a stop—pretextual or otherwise—for a vast array of offenses. These range from the legitimate to the absurd. *See* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L. J. 69, 109 n.266 (2011) (noting that "[s]ince *Whren* [*v. United States*, 517 U.S. 806 (1996)], courts have upheld pretextual stops based on nonmoving violations, including those related to parking.") (citations omitted). It is already common practice for law enforcement personnel to stop individuals for minor offenses (especially traffic offenses) to secure evidence related to more serious crimes for which they do not have a valid basis to

justify a stop. *See generally* Wayne A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1247-48 (2010).

Such concerns are not hypothetical. In 2006, for example, the most common justification cited by New York City police for stopping individuals was presence in a "high crime area" (whatever that might mean). *See* Logan, *Police Mistakes of Law*, 61 EMORY L. J. at 109 n.271 (citing Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1495 (2010)). If that is not enough cause for concern, an additional 32% of stops were based on the time of day, and 23% of police stops were for an unspecified reason. *Id.* Such policing techniques should not be further encouraged by allowing officers free rein to make stops based on reasonable—however arbitrarily and haphazardly decided—mistakes of law.

Moreover, such policing techniques cannot be dismissed as a cost of improving public safety that has limited impact upon the rights of individuals. The North Carolina Supreme Court's suggestion that a traffic stop "is not a substantial interference with the detained individual" fails to pay sufficient heed to realities. *State v. Heien*, 737 S.E.2d 351, 357 (N.C. 2012). To the contrary, encounters with law enforcement—even in the context of a traffic stop—are significant experiences. *See Terry v. Ohio*, 392 U.S. 1, 25 (1968) (acknowledging that police stops can be "annoying, frightening, and humiliating"); *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (noting that traffic stops "create substantial anxiety" and "interfere with freedom of movement, are inconvenient, and consume time."). Furthermore, "even a limited search of the person is a substantial

invasion of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (citing *Terry*, 392 U.S. at 24-25).

Not only are traffic stops a significant deprivation of liberty and privacy, they undermine the right to travel unimpeded. *See Carroll v. United States*, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable [to] subject all persons lawfully on the highways to the inconvenience and indignity of such a search."); *People v. Arthur J.*, 238 Cal. Rptr. 523, 527 (Ct. App. 1987) ("One of our most cherished freedoms is the right to go about our lives without unjustified interference. We safeguard that right by requiring that the police know what the law is in order to arrest someone for a violation of it."). As such, searches incident to arrest for minor traffic offenses are better viewed as vestiges of the general warrants of the Colonial era rather than temporary encumbrances. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989).

If the effects of traffic stops on the individual stopped and these constitutional concerns are not enough, traffic stops based on mistakes of law are unlikely to produce a reciprocal benefit to society. For example, only 4% of more than a half million individuals stopped, questioned, and searched in New York City in 2006 were actually arrested. *See* Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. at 1490 n.161. Additionally, another field study indicates that only 3% of unconstitutional searches revealed evidence, obviating the likelihood of a motion to suppress in

the balance (97%) of cases. *See* Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 332 (2004). Without effective deterrents (including a prohibition on traffic stops based on an officer's mistake of law), law enforcement personnel will likely take advantage of their freedom to stop and search more individuals in the hope of uncovering incriminating (and admissible) evidence.

Put simply, upholding the legality of seizures and ensuing searches based on mistakes of law would result only in an increase of negative effects. *See Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("[I]nvasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of innocent people which turn up nothing incriminating "); *Illinois v. Wardlow*, 528 U.S. 119, 133 n.8 (2000) (Stevens, J., concurring in part and dissenting in part) (asserting that high rates of stops not resulting in arrest "indicate that society as a whole is paying a significant cost in infringement on liberty").

III. Traffic Stops Disproportionately Affect Discrete and Insular Minorities

Low-level offenses involving motor vehicle violations affect millions of citizens each year. It is at this same point of contact between the

government and the individual, however, where the legal system's discretion is at its apex. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 233 (Macmillan Coll. Publ'g Co. 3d ed. 1994) (1966) ("Police work constitutes the most secluded part of an already secluded [criminal justice] system and therefore offers the greatest opportunity for arbitrary behavior.").[5]

Given the discretionary nature of law enforcement—particularly regarding traffic stops—the potential for selective enforcement is high. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."). Even if police officers do not act out of discriminatory intent, enforcement has a disparate impact. For example, a 1999 study by the New Jersey Attorney General found that African-Americans and Hispanics were the subjects of the overwhelming majority of searches (77.2%). *See* PETER VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 27 (1999) (reviewing racial profiling allegations in New Jersey, and providing empirical data and recommendations

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[5] *See also* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 222 (1969) ("[T]he police are among the most important policy-makers of our entire society. And they make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.") (footnote omitted).

for New Jersey law enforcement).[6] Whatever dispute there might be over statistical evidence, one theme is constant: studies overwhelmingly show with statistical significance that it is our nation's discrete and insular minorities who bear the brunt of discretionary traffic stops. As such, legal rulings that have the potential to increase this phenomenon must be limited.

The societal harms associated with the disparate impact of selective enforcement of the law cannot be underestimated given "[t]he real harm [that] arises from the indignity of being publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers." William J. Struntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995). These concerns are aggravated when the subjects are members of groups historically discriminated against. Indeed, statistical and legal analyses demonstrate that "each encounter that an 'innocent' or non-offending [racial minority] has with the police increases their sense of alienation, resentment, and disregard for the police and for the criminal justice system." Oscar H. Gandy, Jr., *Journalists and Academics and the Delivery of Race Statistics: Being a Statistician Means Never Having to Say You're Certain*, 4 RACE & SOC'Y 149, 157 (2001).

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[6] *See also* Dan Eggen, *Official in Racial Profiling Study Demoted*, WASH. POST, Aug. 25, 2005, at A7 (discussing an April 2005 Bureau of Statistic survey of 80,000 people that indicated that minority drivers were three times more likely to have their vehicles searched following traffic stops than white drivers).

In addition, Equal Protection Clause guarantees will be undermined (even if not *per se* violated) if mistake-of-law traffic stops are permitted. This is particularly important because inquiry into the subjective intent of police officers in reviewing a traffic stop under the Fourth Amendment is prohibited. *Whren*, 517 U.S. at 806. This concern is magnified by the lack of meaningful redress available to individuals who believe they are the victims of official discrimination. Following this Court's decision in *Whren*, individuals do not have redress under the Fourth Amendment for race-based traffic stops when there is also an objectively reasonable basis for the stop. *See id.* at 813-16 (holding that a Fourth Amendment challenge is not viable so long as there is at least another independent justification for the search in addition to race, and noting that few police officers would ever state that the vehicle occupant's race was the sole basis for the stop). Consequently, the only recourse an individual has is under the Equal Protection Clause. *See id.* at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

Actually bringing a successful Equal Protection Clause claim for racial profiling, however, is exceeding difficult. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.") (emphasis added).

Consequently, to succeed on a claim under the Equal Protection Clause in the context of selective enforcement of traffic stops, a plaintiff must show not only that the police officer's action has a disparate impact on the plaintiff's racial group, but also that the practices constitute an intentional pattern of discrimination. This effectively insurmountable discriminatory intent requirement acts as a complete bar to equal protection claims based on racial profiling. *See generally* Sarah Oliver, Atwater v. City of Lago Vista: *The Disappearing Fourth Amendment and Its Impact on Racial Profiling*, 23 WHITTIER L. REV. 1099, 1113-14 (2002). Indeed, plaintiffs have failed to meet this standard "even if they alleged that only black and Hispanic residents were subjected to suspicionless stops." *Nat'l Cong. For P.R. Rights v. City of New York*, 75 F. Supp. 2d 154, 167 (S.D.N.Y 1999).[7]

The likely discriminatory impact on discrete and insular minorities, combined with the virtually insurmountable hurdle of proving discriminatory intent required to succeed in a racial profiling claim, therefore further militates against upholding the decision of the North Carolina Supreme Court. To permit otherwise would undermine the concept of equality of citizenship.

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[7] *See also United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1153-63 (D. Kan. 2004) (finding that statistical evidence that Hispanic and African-American drivers were stopped more frequently than white drivers for similar traffic violations, but that this was insufficient to establish discriminatory intent).

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the North Carolina Supreme Court.

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AMICUS CURIAE BRIEF

No. 13-604

In The

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NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF THE STATE OF WISCONSIN, EIGHTEEN OTHER STATES, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a law enforcement officer's objectively reasonable mistake of law can support reasonable suspicion for an investigatory stop under the Fourth Amendment.

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INTEREST OF AMICI CURIAE

Amici States have a compelling interest in the outcome of this case. The question presented is whether a police officer's objectively reasonable mistake of law can form all or part of the reasonable suspicion justifying a traffic stop. Non-consensual traffic stops are made by law enforcement officers every day in every jurisdiction across the country. The legal consequences of those stops are uncertain in jurisdictions where an officer's mistake of law (no matter how reasonable) can render the stop illegal, while a reasonable mistake of fact does not. Compounding this uncertainty is the reality that it is often difficult to determine whether a specific mistake is one of law or one of fact. Amici believe that the North Carolina Supreme Court's decision in this case is correct and should be affirmed. That court's reasoning is consistent with this Court's Fourth Amendment jurisprudence.

SUMMARY OF ARGUMENT

"The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). Consistent with that principle, this Court has held that searches and seizures based on police officers' reliance on a statute or ordinance later declared

unconstitutional, or a judicial decision later overruled, are not subject to the exclusionary rule or do not violate the Fourth Amendment in the first place. *See Davis v. United States*, ___ U.S. ___, 131 S. Ct. 2419, 2429 (2011); *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987); *Michigan v. DeFillippo*, 443 U.S. 31, 37-40 (1979). In such cases, officers act reasonably by relying on controlling law.

These cases recognize that law enforcement officers cannot be expected to scrutinize the validity of a law with the expertise of a lawyer or judge. Similarly, a traffic stop based in whole or in part on an officer's objectively reasonable (but erroneous) interpretation of the law should not be deemed invalid under the Fourth Amendment. *See United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999) (courts "should not expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney").

Several cases from both state and federal courts illustrate the difference between reasonable and unreasonable mistakes of law. Mistakes of law are objectively reasonable under the Fourth Amendment if they arise from an officer's misinterpretation of an unclear, confusing, or counterintuitive statute or set of statutes, as occurred in the present case. Mistakes of law may be objectively unreasonable if they are inconsistent with prior case law or the plain terms of the controlling statute or based solely on an officer's personal views of what the law should be. This case law demonstrates that a consistent and principled distinction can be made between mistakes of law

that violate the Fourth Amendment and those that do not.

Petitioner Nicholas Heien asserts, with minimal analysis, that an officer's reasonable mistake of law should be evaluated according to the maxim that "ignorance of the law is no excuse" and the rule of lenity. While this argument is superficially plausible at first blush, further scrutiny reveals that the policy concerns animating those doctrines are not implicated in the present context. They are simply inapposite.

Finally, this Court should take the opportunity to clarify that reasonable suspicion is the proper level of Fourth Amendment justification for all traffic stops. A small minority of jurisdictions hold otherwise. Three jurisdictions distinguish between stops that must be justified by probable cause and stops that need only be justified by reasonable suspicion. Two jurisdictions require all stops to be justified by probable cause. To ensure that the Court's answer to today's question is applied uniformly in all jurisdictions, the Court should take this opportunity to declare that reasonable suspicion is the correct standard of justification for all traffic stops.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT A REASONABLE MISTAKE OF LAW DOES NOT INVALIDATE AN OTHERWISE LAWFUL TRAFFIC STOP.

Petitioner Nicholas Heien seeks reversal of the North Carolina Supreme Court's decision in this case. In his view, affirmance of that decision will free police officers to interpret the law "aggressive[ly]," and discourage police departments from "using resources at their disposal to ensure that officers on patrol have an accurate understanding of the law" (Pet'r's Br. at 10). If this Court affirms, Heien foresees a nation of rogue officers making near-standardless stops, threatening the civil liberties of innocent drivers from coast to coast.

The reverse is true. The rule carved out by the North Carolina Supreme Court is simple and limited. Neither North Carolina nor amici urge this Court to adopt a rule allowing traffic stops to be made on the basis of *any* legal error. Rather, the States urge that a traffic stop made on the basis of an officer's mistake of law may be upheld if the mistake was *objectively reasonable*. "[E]xisting jurisprudence supplies [a] metric" for which mistakes of law may be deemed reasonable under the Fourth Amendment and which will not (Pet'r's Br. at 30).

There is considerable case law drawing the line between legal errors that will and will not be

tolerated in this context. These cases deem only those mistakes of law arising from unclear and confusing statutory directives to be objectively reasonable. This analytical approach accords with the jurisprudence recognizing the good-faith exception to the exclusionary rule, and provides a just and workable framework for assessing reasonableness in these circumstances.

"The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

Heien argues that "this Court's Fourth Amendment jurisprudence vigilantly distinguishes between rights and remedies—confining the relevance of the reasonableness of any mistakes of law only to the latter sphere" (Pet'r's Br. at 23). It is true that most of the cases examining the consequences of mistakes of law have been concerned with the remedy side of the equation, *i.e.*, whether the exclusionary rule applies. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984). But, as North Carolina shows in its brief, the fact that these cases have generally addressed the mistake of law question on the "remedies" side does not mean mistakes of law cannot be considered on the "rights" side (Resp't's Br. at 26-30). No decision of this Court has ever suggested such a dichotomy.

Moreover, as North Carolina also shows, this Court did address the mistake of law question on the

rights side in *Michigan v. DeFillippo*, 443 U.S. 31 (1979). The question there was whether probable cause for arrest could be based on a city ordinance later declared unconstitutional: "The ordinance is relevant to the validity of the arrest and search only as it pertains to the 'facts and circumstances' we hold constituted probable cause for arrest." *Id.* at 40. In other words, could a reasonable mistake of law provide probable cause to arrest? The Court held that the arrest was lawful despite being based on an ordinance later declared unconstitutional. In the Court's words: "The subsequently determined invalidity of the Detroit ordinance on vagueness grounds *does not undermine the validity of the arrest made for violation of that ordinance* " *Id.* at 40 (emphasis added). Significantly, although *DeFillippo* was without question *not* an exclusionary rule case, it did look to the exclusionary rule's deterrence rationale to support its conclusion. *Id.* at 38 n.3.

Contrary to Heien's characterization of how this Court has treated *DeFillippo* in recent years, it has not been transmogrified into an exclusionary rule case. In *Leon*, cited by Heien, the Court described the decision this way:

> The same attention to the purposes underlying the exclusionary rule *has characterized decisions not involving the scope of the rule itself.* We have not required suppression of the fruits of a search incident to an arrest made in good-faith reliance on a substantive criminal statute that subsequently is declared unconstitutional.

Leon, 468 U.S. at 911-12 (citing *DeFillippo*) (emphasis added). Heien also cites Justice White's concurrence in *Illinois v. Gates*, 462 U.S. 213 (1983), which predated *Leon*'s announcement of a good-faith exception to the exclusionary rule. In his concurrence, Justice White portrayed *DeFillippo* as a suppression case to support his argument that it was time to adopt a good-faith exception. *See id.* at 257 (White, J., concurring). No other Justice of this Court ever seconded Justice White in this characterization of *DeFillippo*, and even he acknowledged that *DeFillippo* "did not modify the exclusionary rule itself," but merely "upheld the validity of an arrest made in good-faith reliance on an ordinance subsequently declared unconstitutional." *Id.* at 257 n.12.

Just as *DeFillippo* consulted exclusionary rule jurisprudence to confirm its conclusion that the arrest in that case did not violate the Fourth Amendment, 443 U.S. at 38 n.3, it is appropriate for the Court in this case to consult the more recent *Leon* jurisprudence to analyze whether a traffic stop based on an officer's reasonable mistake of law violates the Fourth Amendment. As in *DeFillippo*, this jurisprudence provides persuasive (but not binding) authority.

Leon announced a "good-faith exception" to the exclusionary rule where a law enforcement officer relies on a facially valid search warrant. The purpose of the exclusionary rule is to "deter police misconduct," *id.* at 916, particularly where it has been "substantial and deliberate." *Id.* at 906 (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978)).

"[A]ssuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 918. Indeed, punishing a law enforcement officer for objectively reasonable acts "can in no way affect his future conduct unless it is to make him less willing to do his duty." *Id.* at 920 (quoting *Stone v. Powell*, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).

The objective standard of the good-faith exception does not reward individual officers or their departments for poor training; on the contrary, it "requires officers to have a reasonable knowledge of what the law prohibits." *Id.* at 919 n.20.

The reasonable-knowledge requirement does not oblige officers on the beat to be expert legal technicians. In *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006), a search warrant was issued based on the detective's understanding of his informant's "declaration against penal interest." After a four-page analysis "examining more carefully existing case law" on the penal interest doctrine, the Indiana Supreme Court found that the detective was wrong on the law. *Id.* at 958. Nevertheless, it concluded that his error was objectively reasonable. The obligation to know what the law prohibits "does not mean that officers are required to engage in extensive legal research and analysis before obtaining search warrants." *Id.*; *accord United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985)

("the knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers"); *State v. Johnson*, 660 So.2d 648, 654 (Fla. 1995) ("Officers are not expected to possess a lawyer's understanding of the nuances of Fourth Amendment law.").

However, officers are expected to know the clear and fundamental dictates of the laws they are called upon to enforce, and the procedures regulating their enforcement of those laws. Thus, in *Dodson v. State*, 150 P.3d 1054 (Okla. Ct. Crim. App. 2006), the court held that *Leon* could not save the issuance and use of an anticipatory search warrant. Such warrants may be constitutional, the court reasoned, but they were impermissible under the Oklahoma statutes. "[A]nticipatory search warrants are not authorized by Oklahoma law and are therefore not valid. A well-trained officer in Oklahoma should have known that such warrants were not specifically allowed under our statutes." *Id.* at 1058; *accord State v. Allen*, 69 P.3d 232, 233, 236 (Nev. 2003) (en banc) (reasonably knowledgeable law enforcement officer expected to know unambiguous Nevada statutory requirements for search warrants).

This Court's decisions after *Leon* reflect its understanding that a well-trained officer's knowledge of the law cannot be expected to be as sophisticated as that of a lawyer or a judge. Thus, in *Illinois v. Krull*, 480 U.S. 340 (1987), this Court decided that an officer's reliance upon a state statute subsequently declared to be unconstitutional came within the good-faith exception to the exclusionary

rule. The Court noted that "the application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced" and its "deterrent effect . achieved." *Id.* at 347.

> Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.

Id. at 349-50; *see also Davis v. United States*, __ U.S. __, 131 S. Ct. 2419, 2429 (2011) (when police conduct search in objectively reasonable reliance on binding appellate precedent later overturned, exclusionary rule does not apply).

The reasoning of *Leon* and its progeny illuminates the problem of whether traffic stops premised on reasonable mistakes of law violate the Fourth Amendment. *Cf. DeFillippo*, 443 U.S. at 38 n.3 (consulting exclusionary rule's deterrence rationale to support conclusion that reasonable mistake of law does not vitiate probable cause for arrest). If reasonableness is the touchstone of the Fourth Amendment, law enforcement officers should not be expected to interpret the law flawlessly every time. As the North Carolina Supreme Court reasoned in this case: "An officer may make a

mistake, including a mistake of law, yet still act reasonably under the circumstances. [R]equiring an officer to be more than reasonable, mandating that he be perfect, would impose a greater burden than that required under the Fourth Amendment." *State v. Heien*, 737 S.E.2d 351, 356 (N.C. 2012). An objectively reasonable mistake of law should not, on its own, be enough to invalidate a traffic stop.

Amici agree with the North Carolina Supreme Court that a law enforcement officer's mistake of law should be judged by what a reasonably knowledgeable officer can and should be expected to know about the law. These expectations must be limited by the reality that most officers have not been to law school, and should not be faulted for misconstruing unclear or confusing statutes. Where, as here, lawyers and judges contest the meaning of a complex traffic statute as a case wends its way through the appellate process, a police officer cannot be judged "unreasonable" if his statutory interpretation ultimately fails appellate scrutiny.

As the court below observed:

> Concerns about the rules of construction regarding the substantive statutes at issue seem to us to be more applicable to the subsequent interpretation of a statute and not to a routine traffic stop that needs to be based only on reasonable suspicion. A *post hoc* judicial interpretation of a substantive traffic law does not determine the reasonableness of a previous traffic stop within the meaning of the state and federal constitutions. Such a

> *post hoc* determination resolves whether the conduct that previously occurred is actually within the contours of the substantive statute. But that determination does not resolve whether the totality of the circumstances present at the time the conduct transpired supports a reasonable, articulable suspicion that the statute was being violated. It is the latter inquiry that is the focus of a constitutionality determination, not the former.

Heien, 737 S.E.2d at 357; *accord State v. Armstrong*, 477 S.E.2d 635, 638 (Ga. Ct. App. 1996).

The line between reasonable and unreasonable mistakes of law must necessarily be drawn on a case-by-case basis. However, guidance on how to draw this line may be acquired from a review of published cases considering the reasonableness of mistakes of law. The case law belies Heien's prediction that sanctioning traffic stops based on reasonable legal error will lead to random, arbitrary, and unprincipled policing.

The present case provides an excellent example of an objectively reasonable mistake of law. Deputy Darisse noticed that the "right rear brake light [of Heien's car] failed to illuminate," but minutes later "flickered on." 737 S.E.2d at 352. Darisse stopped the car for this "non-functioning brake light." *Id.* The trial court denied Heien's motion to suppress. It concluded that his car did not comply with the set of statutes requiring motor vehicles to "'have all originally equipped rear lamps or the equivalent in

good working order,'" to "'be equipped with a stop lamp on the rear of the vehicle[, which] may be incorporated into a unit with one or more other rear lamps,'" and to have rear brake lights with "'red lenses.'" *Id.* at 353 (citations omitted).

The court of appeals interpreted those statutes differently. After "a long statutory analysis," it concluded that the statutes require only a single brake light, and that, because a "brake light" is not the same as a "stop lamp," it need not be maintained in "'good working order.'" *Id.* at 353-54 (citations omitted); *accord State v. Brown*, 2014 WI 69, ¶¶2, 3, 7, ___ N.W.2d ___ (tail lamps are in "good working order" even where middle bulb in driver-side tail lamp does not light).[1]

The Supreme Court accepted the court of appeals' interpretation, but found that Deputy Darisse's alternative reading was objectively reasonable

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[1]In *Brown*, the Wisconsin Supreme Court held that a traffic stop based on a mistake of law is unlawful. *See id.* at ¶¶42-43. The State had conceded this point on the basis of existing Wisconsin precedent. *Id.*, ¶22 (citing *State v. Longcore*, 594 N.W.2d 412, 416 (Wis. Ct. App. 1999), *aff'd by evenly divided court*, 629 N.W.2d 785 (Wis. 2001)). One month after the State made its concession, certiorari was granted in this case. Subsequently, the Wisconsin Court of Appeals noted that an affirmance in this case "could well throw [*Longcore*] in doubt. We suppose the State can petition the Wisconsin Supreme Court for review and then ask that the petition be held in abeyance pending the outcome in *Heien*." *State v. Houghton*, 2014 WI App 71, n.3, 2014 WL 1797665, ___ N.W.2d ___ (table). The State took the court of appeals' advice. Its Petition for Review in *Houghton* is pending before the Wisconsin Supreme Court.

nevertheless. His understanding was consistent with federal regulations and a reference in one North Carolina statute to "the lenses of multiple 'brake *lights*.'" *Id.* (citation omitted). Moreover, prior to the *Heien* litigation, no appellate decision "had ever interpreted our motor vehicle laws to require only one functioning brake light." *Id.* at 359; *see also United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999) (where applicable statute imposed one set of taillight rules for trailers manufactured *before* 1973, and a second set of rules for those manufactured *after* 1973, "this Court should not expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney").

This case is consistent with other cases holding that an incorrect legal interpretation may be objectively reasonable if it depends on the interplay between multiple statutes or statutory elements. In *United States v. Martin*, 411 F.3d 998, 1000 (8th Cir. 2005), for example, an Oglala Sioux tribal officer stopped a car with one non-functioning rear brake light. He believed the vehicle violated the Tribe's Motor Vehicle Code provision requiring: "'STOP LIGHTS: All motor vehicles shall be equipped with a stop light in good working order at all times. Such stop lights to be automatically controlled by brake adjustment.'" *Id.* at 1000-01 (citation omitted).

The court concluded that the law required only one working brake light. Nevertheless, it found the officer's mistake of law reasonable because the code was "counterintuitive and confusing." *Id.* at 1001.

> [T]his tribal code provision, with its odd reference to "*a* stop light" in working order, is entitled "STOP *LIGHTS*," and further provides that "[s]uch stop *lights* to be automatically controlled by brake adjustment." We recognize that a close textual analysis might explain the use of the plural in the heading and second sentence, while still making sense of a singular requirement in the first sentence, but we think the level of clarity falls short of that required to declare [the officer's] belief and actions objectively unreasonable under the circumstances.

Id. at 100-02; *accord Brown*, 2014 WI 69, ¶¶108-09 (Roggensack, J., dissenting) (reasonable to interpret "'good working order'" requirement to mandate that "every panel in a tail lamp be lit" given that "individual panels of a tail lamp generally function together as a unitary device" and "an unlit panel might impair the function of the lamp").

In *United States v. Southerland*, 486 F.3d 1355 (D.C. Cir. 2007), Washington, D.C. police officers stopped a Maryland driver because his front license plate was positioned on the dashboard instead of the front bumper. 486 F.3d at 1357-58. Maryland law required vehicles to have license plates "'on the front,'" "'[i]n a horizontal position,'" "'securely fastened,'" and "'clearly visible.'" *Id.* at 1359 (citations omitted). Adding these requirements together, the officers concluded that Maryland law required the front plate to be attached to the front bumper. *Id.* at 1357-58. Although the D.C. Circuit disagreed with their interpretation, it upheld the

stop because the mistake of law was "objectively reasonable" in light of the Maryland statute's complex of discrete requirements for the proper display of front license plates. *Id.* at 1359.

In contrast to *Heien*, *Martin*, and *Southerland*, courts have found some law enforcement interpretations of statutes to be both erroneous *and objectively unreasonable*. An officer's mistake of law may be unreasonable if it is inconsistent with prior court decisions, is plainly unsupported by the language of the statute, or is based solely on the officer's belief of what the law should be, rather than what it actually is. These cases reiterate that an officer's mistake must be *objectively reasonable* to justify a stop.

In *United States v. Lopez-Valdez*, 178 F.3d 282, 284-85 (5th Cir. 1999), a state trooper's understanding of the law was directly contrary to an earlier court decision. He stopped a car because its "right taillight had a hole in its lens cover and that the taillight emitted both red and white light," which he believed was an infraction. However, ten years earlier, the Texas Criminal Court of Appeals had held that "a broken lens causing a taillight to emit both red and white light does not constitute an offense and as such could not serve as the basis for a traffic stop." *Id.* at 285 (summarizing *Vicknair v. State*, 751 S.W.2d 180 (Tex. Crim. Ct. App. 1986)). The Fifth Circuit easily found that the trooper's mistake of law was not reasonable. "Ten years after *Vicknair*, no well-trained Texas police officer could reasonably believe that white light appearing with red light through a cracked red taillight lens

constituted a violation of traffic law." *Id.* at 289. *Cf. Brown*, 2014 WI 69, ¶110 (Roggensack, J., dissenting) (mistake of law reasonable where supported by unpublished appellate decision).

Even absent court precedent, an officer's interpretation may be unreasonable when it is unsupported by plain statutory language. In *United States v. Cole*, 948 F.Supp.2d 1251 (W.D. Wash. 2013), for example, a National Park Service Ranger stopped a truck driving through Olympic National Park with its left turn signal on for one quarter of a mile (ten to fifteen seconds of driving time) without turning left. The ranger cited the driver for "Improper Use of a Turn Signal," and justified the stop on that improper use. *Id.* at 1254. The court found that the stop was based on an unreasonable mistake of law because "the alleged infraction, having a turn signal on without turning, was simply not a violation of [Washington's negligent driving] law." *Id.* at 1255; *accord United States v. Miller*, 146 F.3d 274, 278 (5th Cir. 1998) (unreasonable to infer from statutory provisions requiring vehicles to be equipped with working lights that leaving left turn signal on without turning left or changing lanes is a traffic violation).

An officer's mere belief about what a statute *should* but does not say is an unreasonable basis for a stop. In *United States v. Washington*, 455 F.3d 824 (8th Cir. 2006), an officer stopped a vehicle with a long horizontal crack across the windshield at eyelevel. He believed the crack violated Nebraska's vision obstruction statute, which prohibits hanging objects inside a vehicle that obstruct the driver's

vision. *Id.* at 826. The crack did not violate the obstruction provision or any other Nebraska law. The trial court found that the officer's mistake was reasonable, observing that it was reasonable for him to believe that such a crack "'*would* be a violation of the traffic laws'" even if it was not. *Id.* at 826 (emphasis added).

The Eighth Circuit held that the officer's mistake of law was unreasonable because the statute "*clearly* does not prohibit the conduct Officer Antoniak thought it did." *Id.* at 827 (emphasis added); *accord J.D.I. v. State*, 77 So.3d 610, 621 (Ala. Crim. App. 2011). The appeals court was especially critical of the lower court's comment that, even if the cracked windshield was not a legal violation, it should be. "The concept of an objectively reasonable mistake of law cannot be so unmoored from actual legal authority." *Washington*, 455 F.3d at 828. In the absence of statutory ambiguity, "officers cannot act upon misunderstandings of clear statutes or, worse yet, their own notions of what the law ought to be." *Id.*

Amici ask this Court to affirm the North Carolina Supreme Court. Its decision that an objectively reasonable mistake of law may be considered among the totality of the circumstances in a reasonable-suspicion analysis is consistent with this Court's Fourth Amendment jurisprudence. The case law in this area demonstrates that courts do not have a problem applying a "reasonable mistake of law" standard in a fair, logical, and consistent manner.

II. THE "IGNORANCE OF THE LAW IS NO DEFENSE" DOCTRINE AND THE RULE OF LENITY ARE INAPPOSITE.

With minimal analysis, Heien recruits two ancient legal doctrines to support his core contention that mistakes of law by police officers are per se unreasonable under the Fourth Amendment. Those doctrines are the maxim that "ignorance of the law is no excuse" and the rule of lenity. Heien's arguments have a surface appeal, but no more than that. Heien does not go beyond the bare recitation of these rules to explain why they should be transplanted into the reasonable-suspicion analysis. The policies animating these rules have little parallel in the traffic stop context, and employing them here will not achieve their underlying goals.

The common law doctrine that "ignorance of the law is no excuse" is universally admitted to be a legal "fiction, because no man can know all the law." *Hale v. Morgan*, 584 P.2d 512, 517 (Cal. 1978). It was originally premised "on the fact that most common law crimes were *malum in se*. Seen as 'inherently and essentially evil' ignorance of the prohibition of such crimes was simply untenable." *Miller v. Commonwealth*, 492 S.E.2d 482, 485 (Va. Ct. App. 1997) (quoting *Black's Law Dictionary* 959 (6th ed. 1990)). The doctrine applies less comfortably to *malum prohibitum* crimes, *i.e.*, "acts that are 'wrong because prohibited,' not by virtue of their inherent character." *Id.* (quoting *Black's* at 960). Regardless, the doctrine is assumed to promote

the citizenry's knowledge of both categories of crime. *Id.*

In modern times, the fiction is maintained "largely for pragmatic purposes." *Id.* "'If ignorance of the law were an excuse, laws would be applied willy-nilly depending upon the individual's legal knowledge; the result would be legal chaos and there would be no rule of law at all.'" *Wiard v. Liberty Northwest Ins. Corp.*, 79 P.3d 281, 287 (Mont. 2003) (citation omitted); *accord State v. Western Union Tel. Co.*, 97 A.2d 480, 494 (N.J. 1953).

> The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement. If a person accused of a crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. No system of criminal justice could be sustained with such an element in it to obstruct the course of its administration.

People v. Noori, 39 Cal. Rptr. 3d 153, 163 (Cal. Ct. App. 2006); *accord Burggraff v. Baum*, 720 A.2d 1167 (Me. 1998) ("'Ignorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can always be pretended.'") (quoting Letter from Thomas Jefferson to Andre Limozin, December 22, 1787, *reprinted in Papers of Thomas Jefferson* 451 (Julian P Boyd ed. 1955)).

Heien argues that this maxim should apply, by analogy, to mistakes of law by police officers making traffic stops (Pet'r's Br. at 17). Although superficially plausible, the argument fails because it ignores the reason for the ignorance-of-the-law doctrine. In its modern form, the fiction is a bulwark against legal chaos. Without it, each citizen would be subject only to the unique set of laws she knows apply to her, and "criminal statutes would be in suspense on any point not authoritatively settled." *United States v. Barker*, 546 F.2d 940, 965 (D.C. Cir. 1976). Arguably, that alternative system would be fairer to the individual. But we have rejected that alternative. Our system "preserv[es] a community balance," which, as Justice Holmes explained, recognizes "that 'justice to the individual is rightly outweighed by the larger interests on the other side of the scales.'" *Id.* at 964 (quoting Oliver Wendell Holmes, *The Common Law* 48 (1881)). In this balance, the burden of ignorance is placed on the individual defendant.

When the ignorance-of-the-law doctrine is considered and recognized as a legal fiction that strikes an uncomfortable but necessary balance between absolute fairness to the individual and the general needs of society, it becomes clear that it cannot be easily called from its own circumscribed habitat to answer legal questions in unrelated settings. The concerns underlying the doctrine have little place in the circumstances leading to and surrounding a traffic stop.

First, and most obviously, extending the doctrine to traffic stops does not further the pragmatic

concerns underlying the doctrine. The doctrine relieves the prosecution of having to prove, beyond a reasonable doubt, a criminal defendant's actual personal knowledge of the law she is accused of violating. It is essentially a trial tool that eliminates what could be an insurmountable obstacle to proving the defendant's criminal liability. Criminal liability is not at issue during a traffic stop. A street or highway is not a court of law in which the guilt of the driver (or, for that matter, the officer) is to be proved. The question is simply whether an officer has an articulable basis, grounded in reasonable suspicion, for stopping a moving vehicle.

Second, extending the doctrine to traffic stops is unnecessary to promote officers' knowledge of the law. As set forth in the first section of this brief, courts upholding traffic stops premised on mistakes of law have done so only where the underlying statute was "counterintuitive and confusing." *Martin*, 411 F.3d at 1001. The officers in those cases were not ignorant of the law. They were aware of the statutes they purported to enforce, and believed they were enforcing them correctly. The problem was that the statutes were obscure in some way and misinterpreted by the officers. *See, e.g., id.* It is safe to assume that, after each of these incidents, the court's statutory clarification was incorporated into the jurisdiction's police training programs. Any subsequent repetition of an adjudicated mistake of law could not, of course, be deemed "reasonable." *See Lopez-Valdez*, 178 F.3d at 289.

Third, just as the ignorance-of-the-law doctrine places the burden of legal knowledge on the defendant,[2] the burden of legal knowledge is on the government when traffic stops are litigated. The State is not required to prove that a defendant had actual knowledge that her actions constituted a crime. However, the State is required to prove that its traffic stops are reasonable, and that the grounds for those stops are either a correct interpretation of the law or an objectively reasonable (if mistaken) interpretation of the law. *See United States v. Delfin-Colina*, 464 F.3d 392, 400 (3d Cir. 2006). This proof typically requires the officer who made the stop to testify in court and articulate his reasons for stopping the defendant. *See id.* at 394. An arresting officer knows he will be required to testify if the defendant challenges the stop or any ensuing searches or seizures. The necessity of appearing in court to justify his actions and identify the legal basis for the stop is a significant protection against police carelessness, lawlessness, or deliberate ignorance.

Finally, allowing for reasonable mistakes of law strikes a balance comparable to that expressed by Justice Holmes. On one side is the individual and on the other society as a whole. A traffic stop of an individual may lead to a criminal prosecution. If the stop was based on a mistake of law, the individual can challenge the stop in court. If the mistake was objectively reasonable, the stop will be upheld and

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[2]Amici concede that this burden might be better characterized as an "irrebuttable presumption."

the individual may eventually be convicted of a crime he actually committed. Thus, "'justice to the individual is rightly outweighed by the larger interests on the other side of the scales.'" *Barker*, 546 F.2d at 964. The balance ensures accountability from both sides—guilty defendants will be convicted and the State will be limited to constitutionally reasonable practices. To require scholarly perfection from officers, as Heien demands, would upset, not preserve, this balance. *See Powell*, 428 U.S. at 539-40 (White, J., dissenting) (punishing objectively reasonable acts "'can in no way affect [an officer's] future conduct unless it is to make him less willing to do his duty'").

For all these reasons, Heien's ignorance-of-the-law argument should be rejected. Heien's analogy to the rule of lenity fares no better.

The rule of lenity dates back to Early Modern England, when most felonies carried the death penalty. *State v. Hearn*, 797 N.W.2d 577, 585 (Iowa 2011); *City of Seattle v. Winebrenner*, 219 P.3d 686, 694-95 (Wash. 2009) (en banc) (Madsen, J., concurring). The rule was intended to mitigate the harsh effects of the criminal law by limiting the circumstances in which capital punishment could be imposed. *See id.* It was adopted by this Court in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Writing for the Court, Chief Justice John Marshall noted that the rule was historically "founded on the tenderness of the law for the rights of individuals." *Id.*

In American practice, the original impetus for the rule of lenity has given way to two distinct but related concerns. First, its application is intended to "ensure that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota v. United States*, 471 U.S. 419, 427 (1985). As explained by Justice Holmes:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931); *accord United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Ashurov*, 726 F.3d 395, 402 (3d Cir. 2013).

The second modern concern underlying the rule of lenity comes from separation of powers. Chief Justice Marshall first noted this function in *Wiltberger*: "[T]he plain principle [is] that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95; *accord Liparota*, 471 U.S. at 427 (rule of lenity "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability"); *Bass*, 404 U.S. at 348 ("because criminal

punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"); *United States v. Manzo*, 636 F.3d 56, 65 n.8 (3d Cir. 2011).

While considering these two goals of the rule, it is also important to remember the context in which the rule is implemented. It is used by judges in criminal prosecutions to interpret ambiguous penal statutes. "More specifically the rule of lenity comes into play after two conditions are met: (1) the penal statute is ambiguous; and (2) we are unable to clarify the intent of the legislature by resort to legislative history." *State v. Cole*, 663 N.W.2d 700, 714-15 (Wis. 2003). Only when it cannot decide whether the harsher or milder construction of a statute is the correct one will the court apply the rule of lenity and interpret the statute in the defendant's favor. *Id.*

The rule of lenity does not clarify the analysis of traffic stops based on reasonable mistakes of law in any useful way.

First, the rule of lenity is a canon of statutory construction employed by judges to fulfill their constitutional function of declaring what the law is. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) ("'It is emphatically the province and duty of the judicial department to say what the law is.'") (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). It is not a tool for police officers and state troopers in the field making quick determinations about whether drivers are violating the traffic laws. These officers should be well-versed

and trained in the laws they are employed to enforce. But they cannot be expected to apply judicial canons of statutory construction to those laws.

Second, the rule of lenity protects a person from criminal liability when, because of a statute's unclear directives, he has not "received fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. This protection keeps the person free from prison, fines, and other criminal penalties for committing acts that he could not have reasonably known were against the law. This policy has no parallel in the traffic stop context. If a traffic stop is based on an officer's reasonable mistake in interpreting an unclear statute, the driver is not subject to any criminal liability pursuant to the unclear statute or the officer's misinterpretation of it. Granted, the officer's mistake may be the first in a series of events that end in criminal liability. But that liability will arise from crimes actually committed by the defendant, not from the officer's mistake of law in making the traffic stop. *Cf. New York v. Harris*, 495 U.S. 14, 18-19 (1990) (probable cause arrest following warrantless home entry is lawful, and statements made after arrest admissible despite unconstitutional entry).

Finally, the separation of powers purpose underlying the rule of lenity is not served by forcing this analogy on traffic stops based on objectively reasonable mistakes of law. Emphasizing that it is the function of the legislature, not the judiciary, to create crimes, the rule of lenity ensures that both branches perform their jobs properly. *See Wiltberger*,

18 U.S. at 95. On the one hand, it ensures that the courts will not recognize crimes that do not exist just because they seem like a good idea. *Cf. Washington*, 455 F.3d at 826. On the other hand, it reminds the legislature that criminal statutes must be written with precision and clarity. 3 Norman Singer et al., *Sutherland Statutory Construction*, § 59.4 (7th ed. 2012). The rule of lenity is often expressed as "requir[ing] a court to resolve ambiguities in a defendant's favor." *See, e.g., State v. Williams*, 326 P.3d 1070, 1074 (Kan. 2014). The flipside of that is that these ambiguities will be decided *against the legislature. See McBoyle*, 283 U.S. at 27; Singer, *supra*, §§ 59:3-4 (rule of lenity puts burden on legislature).

An officer reasonably but erroneously interpreting a confusing or unclear statutory directive may be at the mercy of faulty legislative draftsmanship. Where, as in this case, one trial judge and two layers of appellate court judges cannot agree on the meaning of a statute, it makes no sense to recruit the spirit of the rule of lenity to invalidate the traffic stop. By carefully construing a statute and trying to divine legislative intent, courts do their job of saying what the law is. If, as happened here, the statutory meaning was obscure or irrational, the legislature did not do its job of drafting clear, understandable legislation. The blame should not be placed on the officer who was trying to do his job in a reasonable manner.

Indeed, where the problem is faulty legislative draftsmanship, the spirit and logic of *Krull*, *Davis*,

and *DeFillippo* (*see supra* at 9-11), not the rule of lenity, provide persuasive authority. In *Krull* and *Davis*, this Court concluded that searches and seizures authorized by police reliance on a law later declared unconstitutional or an appellate precedent later overturned are not subject to the exclusionary rule. *See Davis*, 131 S. Ct. at 2429; *Krull*, 480 U.S. at 349-50. In *DeFillippo*, an arrest based on an ordinance later declared unconstitutional did not violate the Fourth Amendment. *DeFillippo*, 443 U.S. at 37-40. Analogously, a traffic stop does not violate the Fourth Amendment where an officer reasonably but erroneously interprets a statute that a court subsequently construes differently.

For all these reasons, this Court should decline Heien's invitation to interpret the question presented today through the lens of the rule of lenity. Like the ignorance-of-the-law doctrine, the rule of lenity is simply inapposite to how a police officer in the field determines whether he has the reasonable suspicion necessary to stop a moving vehicle.

III. THIS COURT SHOULD CLARIFY THAT ONLY REASONABLE SUSPICION IS REQUIRED TO JUSTIFY A TRAFFIC STOP.

The North Carolina Supreme Court's mistake-of-law analysis presumes that traffic stops need only be justified by reasonable suspicion. Its core insight is that a bright-line rule precluding consideration of an

officer's objectively reasonable mistake of law is "inconsistent with the rationale underlying the reasonable suspicion doctrine." 737 S.E.2d at 357. "Such a rule would insert rigidity into a fluid concept, which we think inappropriate." *Id.* at 358.

Not all jurisdictions employ the reasonable suspicion standard for every traffic stop. Three jurisdictions use a two-tiered standard of justification, requiring a showing of reasonable suspicion for some stops and a probable cause showing for others. At least two jurisdictions require a showing of probable cause for all traffic stops. Meanwhile, the vast majority of state courts and nearly all federal courts of appeal have adopted a single reasonable suspicion standard for all traffic stops. In the interest of nationwide consistency, and clarity in the judicial treatment of traffic stops based in part on mistakes of law, amici urge this Court to take this opportunity to clarify that reasonable suspicion is a sufficient basis under the Fourth Amendment to justify any traffic stop.

Jurisdictions that employ a two-tiered standard of justification distinguish between traffic stops that require investigation from those that do not. If a law enforcement officer sees a statutory traffic violation (*e.g.*, speeding) committed in his presence, he has no need to investigate to ascertain whether that violation has occurred. In those circumstances, the stop of the speeding driver must be based on probable cause. *See State v. Longcore*, 594 N.W.2d 412, 416 (Wis. Ct. App. 1999), *aff'd by evenly divided court*, 629 N.W.2d 785 (Wis. 2001). In contrast, if an

officer sees suspicious activity suggesting that a traffic violation or crime might be taking place (*e.g.*, a car is weaving between lanes and moving very slowly), further investigation is needed to determine whether the driver is violating the traffic laws or committing a crime. In those circumstances, the stop may be based on reasonable suspicion. *See id.*

The Supreme Court of Pennsylvania adopted the following articulation of the dichotomy:

> If reasonable suspicion exists, but a stop cannot further the purpose behind allowing the stop, the "investigative" goal as it were, it cannot be a valid stop. Put another way, if the officer has a legitimate expectation of investigatory results, the existence of reasonable suspicion will allow the stop—if the officer has no such expectations of learning additional relevant information concerning the suspected criminal activity, the stop cannot be constitutionally permitted on the basis of mere suspicion[, but requires probable cause].

Commonwealth v. Chase, 960 A.2d 108, 115 (Pa. 2008); *accord State v. Tyler*, 830 N.W.2d 288, 293, 297-98 (Iowa 2013).

Some courts go even further than the *Longcore*-type cases, and hold that probable cause is the single uniform standard for all traffic stops. *See Lloyd v. Commonwealth*, 324 S.W.3d 384 (Ky. 2010); *State v.*

Matthews, 884 P.2d 1224, 1225-26 (Or. 1994) (en banc).

The foregoing case law is inconsistent with the overwhelming weight of authority on this question. The contrary conclusion (that reasonable suspicion provides the necessary and sufficient basis for a traffic stop) has been reached by this Court implicitly and the vast majority of federal and state appellate courts explicitly.

Several decisions of this Court support the conclusion that the reasonable suspicion standard enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968), is the standard applicable to traffic stops. In deciding that police questioning during an ordinary traffic stop does not constitute "custodial interrogation,"[3] the Court noted that "the usual traffic stop is more analogous to a so-called 'Terry stop,' than to a formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *accord Knowles v. Iowa*, 525 U.S. 113, 117 (1998). In a case challenging the right of the United States Border Patrol to stop cars near the Mexican border in order to question occupants about their immigration status, this Court held that such stops require reasonable suspicion drawn from "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

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[3]Within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Nearly[4] every federal circuit court to consider the issue has concluded that reasonable suspicion is the minimum applicable standard for traffic stops and that probable cause is not required. *See id.* (collecting cases); *United States v. Fox*, 393 F.3d 52, 59 (1st Cir. 2004), *cert. granted and decision vacated on other grounds*, 545 U.S. 1125 (2005); *Smith v. City of Chicago*, 242 F.3d 737, 742-43 (7th Cir. 2001); *United States v. Hill*, 131 F.3d 1056, 1059 (D.C. Cir. 1997). So have the majority of state courts. *See, e.g.*, *People v. James*, 358 N.E.2d 88, 92 (Ill. App. Ct. 1976); *Hutton v. Townsend*, 213 N.W.2d 320, 324 (Mich. App. Ct. 1973); *State v. Barber* 241 N.W.2d 476, 477 (Minn. 1976); Wayne R. LaFave, *Search and Seizure* § 9.3(a) n.20 (5th ed. 2012) (collecting cases).

As these authorities agree, *Terry* forms the most appropriate standard for traffic stops. Amici concede that, in some instances, the "investigatory" function underlying *Terry* may be absent. *See, e.g.*, *Longcore*, 594 N.W.2d at 416. However, the two most distinctive characteristics of the typical traffic stop resonate with *Terry*.

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[4]Except the Sixth Circuit, which has taken a unique approach to the question. *See Hoover v. Walsh*, 682 F.3d 481, 493 (6th Cir. 2012) ("We previously have held that a traffic stop is justified when a police officer has reasonable suspicion of an ongoing crime or a completed felony or when he has probable cause to believe that a civil traffic violation has been committed.").

A key purpose of a *Terry* stop is to allow law enforcement "to maintain the status quo momentarily." *Adams v. Williams*, 407 U.S. 143, 146 (1972). The need to maintain the status quo is especially important on the roads and highways. After all, a car is literally a moving target. *See People v. Glick*, 250 Cal. Rptr. 315, 319 (Cal. Ct. App. 1988) (noting "the inherent transient nature of automobiles"). An officer who observes a vehicle moving down the road in a manner indicating or suggesting a traffic violation or crime may forever lose his opportunity to halt or investigate the infraction if he does not stop the vehicle immediately.

Another feature shared by the typical *Terry* stop and the usual traffic stop is their brevity. As this Court wrote in *Berkemer*, "most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*." *Berkemer*, 468 U.S. at 440 n.29. They are

> presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he will most likely to be allowed to continue on his way.

Id. at 437.

This Court has observed several times over the years that a typical traffic stop is like a *Terry* encounter, but has never expressly stated that reasonable suspicion provides the legal basis for all traffic stops. Although most jurisdictions have already reached this conclusion, a small minority hold that reasonable suspicion is an insufficient basis for some or all traffic stops, and that the higher standard of probable cause is sometimes or always required by the Fourth Amendment. To ensure that the Court's answer to the question presented in the present case is applied predictably and uniformly in all jurisdictions, amici ask the Court to take this opportunity to clarify definitively that reasonable suspicion is the necessary and sufficient legal basis for all traffic stops.

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Respectfully submitted,

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